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EDITOR'S NOTE

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85-1099

Title: Atchison, Topeka and Santa Fe Railway Company, Petitioner
v.
Jim Buell

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Lee, Rex E.

Counsel for respondent: McCall, James R.

| try | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Dec 6 1985 | | Application for extension of time to file petition and order granting same until February 17, 1986 (Rehnquist, December 10, 1985). |
| 2 | Jan 6 1986 | G | Petition for writ of certiorari filed. |
| 4 | Jan 30 1986 | | Order extending time to file response to petition until February 21, 1986. |
| 5 | Feb 20 1986 | | Brief amicus curiae of Assn. of American Railroads, et al. filed. |
| 6 | Feb 21 1986 | | Brief amicus curiae of Air Transport Association of America filed. |
| 7 | Feb 21 1986 | | Brief of respondent Jim Buell in opposition filed. |
| 8 | Feb 26 1986 | | Reply brief of petitioner AT&SF Rwy. Co. filed. |
| 9 | Feb 26 1986 | | DISTRIBUTED. March 21, 1986 |
| 10 | Apr 16 1986 | | REDISTRIBUTED. May 2, 1986 |
| 11 | May 5 1986 | | Petition GRANTED. |
| | | | ********** |
| 13 | Jun 3 1986 | | Order extending time to file brief of petitioner on the merits until July 19, 1986. |
| 14 | Jun 14 1986 | | Record filed. |
| 15 | Jun 14 1986 | | Certified copy of original record and proceedings, 4 volumes, received. |
| 16 | Jul 15 1986 | | Joint appendix filed. |
| 17 | Jul 18 1986 | | Brief of petitioner AT&SF Rwy. Co. filed. |
| 18 | Jul 18 1986 | | Brief amicus curiae of Assn. of American Railroads filed. |
| 19 | Jul 18 1986 | | Brief amicus curiae of Natl. Railway Labor Conference filed. |
| 21 | Aug 13 1986 | | Order extending time to file brief of respondent on the merits until September 17, 1986. |
| 22 | Sep 17 1986 | | Brief amicus curiae of AFL-CIO, et al. filed. |
| 23 | Sep 17 1986 | | Brief amicus curiae of Teamsters for a Democratic Union, et al. filed. |
| 24 | Sep 18 1986 | | Brief of respondent Jim Buell filed. |
| 25 | Sep 22 1986 | | CIRCULATED. |
| 26 | Oct 6 1986 | | SET FOR ARGUMENT. Monday, December 1, 1986. (1st case) (1 hour). |
| 27 | Nov 3 1986 | X | Reply brief of petitioner AT&SF Rwy. Co. filed. |
| 28 | Dec 1 1986 | | ARGUED. |

# PETITION FOR WRIT OF CERTIORARI

(1)

**85-1140**

No. ———

Supreme Court, U.S.
FILED
JAN 6 1986
JOSEPH F. SPANIOL, JR.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
*Petitioner,*

v.

JIM BUELL,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Whether the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, should be interpreted so as to minimize the likelihood of conflict between their provisions, and more specifically, whether the court of appeals erred in holding that a claim solely for emotional injuries is actionable under the FELA, where the alleged source of such injuries was a workplace dispute subject to mandatory grievance procedures which had been initiated pursuant to the RLA.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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No.

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THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
*Petitioner,*

v.

JIM BUELL,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-7a) is reported at 771 F.2d 1320 (1985). The district court's opinion (App., *infra*, 8a-15a), granting petitioner's motion for summary judgment based on lack of subject matter jurisdiction, is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on September 19, 1985. On December 10, 1985, Justice Rehnquist extended the time for filing a petition for a

writ of certiorari to and including January 17, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Title I, Section 2 of the Railway Labor Act ("RLA"), 45 U.S.C. § 151a, provides in pertinent part:

> The purposes of the Act are (1) to avoid any interruption to Commerce or to the operation of any carrier engaged therein . . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

Title I, Section 2 of the RLA, 45 U.S.C. § 152, provides in pertinent part:

> *First. Duty of carriers and employees to settle disputes.* It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> *Second. Consideration of disputes by representatives.* All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.[1]

Section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, provides in pertinent part:

[1] The text of 45 U.S.C. § 153 First (i), setting forth the procedures applicable to resolution of grievances under the RLA, is provided in the Appendix, *infra*, 25a.



> Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

## STATEMENT

1. Petitioner, Santa Fe, is a common carrier by rail operating in the western and midwestern United States. At all times relevant to this action, respondent, Jim Buell, worked as a carman in Santa Fe's rail yard in Stockton, California. The terms and conditions of respondent's employment were governed by a collective bargaining agreement entered into, pursuant to the RLA, by the petitioner and the Brotherhood of Railway Carmen of the United States and Canada (App., *infra*, 9a). Rule 39 of that agreement provides a detailed mechanism whereby an aggrieved employee, with or without the assistance of his union representatives, can initiate and prosecute a grievance through successive levels of appeal up to and including mutually binding arbitration before a National Railroad Adjustment Board ("NRAB") (App., *infra*, 26a-28a).

The gravamen of respondent's complaint concerns several practices which allegedly occurred shortly after his immediate supervisor, Ed Wright, began working at the Stockton yard in September, 1979. Mr. Wright allegedly insisted that respondent and other carmen complete certain car inspection reports in a manner that conflicted with instructions previously given by Mr. Wright's supervisor, making it impossible for carmen to satisfy both of their supervisors (App., *infra*, 9a). Mr. Wright purportedly also required respondent to help him remove

what Mr. Buell believed to be company property (*e.g.*, ice and scrap plywood) from the yard, a practice which respondent resented because he believed it was illegal (*id.*). Respondent also believed that Mr. Wright failed to take appropriate disciplinary measures against a co-worker responsible for having posted a derogatory cartoon concerning respondent (App., *infra*, 10a).

Pursuant to the collective bargaining agreement's grievance procedures, respondent and several other carmen enlisted the aid of their union representative to draft a written grievance about Mr. Wright in early 1981 (App., *infra*, 10a). Subsequently, a meeting between Santa Fe and union officials was held at which complaints about Mr. Wright's conduct were aired (*id.*). On June 5, 1981, respondent's union transmitted a letter to Santa Fe threatening further action under the grievance procedures unless petitioner took what the union considered to be appropriate action concerning the complaints of respondent and other carmen working under Mr. Wright at Stockton (*id.*). Neither respondent nor his union further pursued remedies under the RLA.

On October 13, 1981, respondent was admitted to St. Joseph's Hospital in Stockton, California, where he was diagnosed as suffering from major depression, a passive-aggressive personality disorder, and moderate obesity (App., *infra*, 9a). Respondent was hospitalized for 17 days, and his doctor did not authorize his return to work until October 1, 1982 (*id.*).

2. On September 2, 1982, respondent filed this action under the FELA, 45 U.S.C. § 51, in the United States District Court for the Eastern District of California alleging that petitioner negligently and intentionally failed to provide respondent a safe place to work by failing to prevent his fellow employees and foreman from harassing, intimidating and threatening him. Respondent further



claimed that petitioner's conduct had caused him severe mental and emotional injuries.

Petitioner moved for summary judgment on the ground that the district court lacked subject matter jurisdiction over the action. The district court granted the motion (App., *infra*, 8a-15a).

The district court relied on decisions of this Court and the Court of Appeals for the Ninth Circuit holding that actions brought under state law are preempted where the labor-management disputes giving rise to such actions are subject to RLA-mandated grievance procedures set forth in collective bargaining agreements. *See Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320 (1972); *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).[2]

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[2] In *Andrews*, petitioner, claiming he was wrongfully discharged, filed a state court action for breach of contract. This Court held that because the collective bargaining agreement was the source of petitioner's right not to be discharged and of his employer's obligation to restore him to his regular employment following an injury, petitioner was required to follow the grievance procedures mandated by the RLA.

In *Magnuson*, a train dispatcher brought an action based on common-law intentional infliction of emotional distress based on the railroad's alleged abuse of its investigatory and hearing processes leading to the dispatcher's discharge. The court of appeals, citing *Andrews*, held that the action was prempted because it was "based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A." 576 F.2d at 1369. The court of appeals further stated (*id.*):

> Every employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged. Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge. If the pleading of emotional injury permitted aggrieved employees to avoid the impact of the R.L.A., the congressional purpose of providing a comprehensive federal

Based on these cases, the district court found dispositive the fact that "plaintiff's injury flows directly from defendant's alleged failure to take appropriate disciplinary measures with regard to alleged misconduct by plaintiff's supervisor and several of his co-workers" (App. 14a). Because "[t]his type of wrongdoing . . . is directly related to the employer-employee relationship" (*id.*), the district court concluded that the claim was subject to the exclusive grievance procedures of the RLA. The district court also found it significant that (*ibid.*):

> Plaintiff has never suggested that he could not have invoked the grievance procedures contained in the collective bargaining agreement to address the harassment he was suffering. On the contrary, the fact that union representatives did submit a written grievance with regard to the perceived harassment by Mr. Wright indicates that the grievance procedures did apply to this type of dispute.[3]

3. The court of appeals reversed (App., *infra*, 1a-7a), relying essentially on two grounds to support its conclu-

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scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted.

In *Beers*, a railroad employee brought an action under state law alleging that defendant's employers had embarked upon a course of harassment amounting to intentional infliction of emotional distress. The court of appeals, citing *Magnuson*, again held that the action was preempted by the RLA.

[3] In the district court's view, the possible differences in the relief available under the two acts did not alter the exclusivity of the RLA procedures for resolving employer-employee disputes (App. 14a):

> [T]he Court must focus on the *source* of the injury rather than on the type of the desired relief. Because the injury here had its genesis in a labor problem which constitutes a minor dispute within the meaning of the RLA, this Court is without jurisdiction to entertain plaintiff's claims. (Emphasis in original.)



sion that respondent stated a claim under the FELA. First, the court of appeals addressed "whether a railroad employee's wholly mental injury stemming from his railroad employment is compensable under the [FELA]" (App., *infra*, 2a). The Ninth Circuit held that a cause of action alleging solely emotional injuries is cognizable under the FELA, because in its view "the Act encompasses all reasonably foreseeable injuries which result from a railroad's failure to exercise due care with respect to its employees" (App., *infra*, 3a).

Second, the court of appeals addressed the holding of the district court that, because the workplace dispute which gave rise to respondent's complaint was subject to grievance procedures set forth in the collective bargaining agreement, the RLA made those procedures the exclusive remedy for respondent's claims. The Ninth Circuit held that the principles set forth in *Andrews* and its progeny were not applicable to respondent's claims, because those cases involved preemption of state law claims by federal law, whereas the instant case was brought under the FELA (App., *infra*, 7a). The court of appeals attempted further to distinguish the *Andrews* line of cases on the ground that respondent's claim "is neither related to the collective bargaining agreement nor arguably governed by its provisions" (*id.*).[4]

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[4] This declaration by the court of appeals, for which it cited no authority or evidence in the record, is simply baffling in light of the fact that respondent and other carmen initiated grievance procedures as provided in the collective bargaining agreement with respect to the very issues raised by respondent in this case (App., *infra*, 10a, 14a). Moreover, it is wrong. As the district court found: "Plaintiff's injury flows directly from defendant's alleged failure to take appropriate disciplinary measures with regard to alleged misconduct by plaintiff's supervisor and several of his co-workers. This type of wrongdoing . . . is directly related to the employer-employee relationship" (App. 14a).

## REASONS FOR GRANTING THE PETITION

The decision of the court of appeals permits railroad employees with grievances concerning working conditions to evade, by means of artful pleading under the FELA, grievance procedures explicitly provided under the RLA and collective bargaining agreements as the exclusive means of resolving such disputes. The decision needlessly brings into conflict the statutory schemes and Congressional policies embodied by the FELA and the RLA by misinterpreting both acts. In so doing, the Ninth Circuit's opinion conflicts with (1) the decisions of this Court and those of the courts of appeals for several circuits, which have made clear that Congress intended the grievance provisions of the RLA to be interpreted broadly in order to facilitate the "prompt and orderly settlement of *all* disputes growing out of grievances" in the railroad industry, and (2) the recent decisions of the courts of appeals in at least four circuits which have held that a cause of action alleging solely emotional or non-physical injury is *not* cognizable under the FELA, precisely because a contrary interpretation—such as that of the Ninth Circuit—invites litigants to avoid the grievance resolution mechanisms required by the RLA.

Because it involves interpretation of the two basic statutes dealing with employer-employee relations in the railroad industry, the conflict in the circuits has potential direct effect on all railroad employees and indirect effects on other important national interests. If allowed to stand, the Ninth Circuit's decision will channel the most elementary employer-employee disputes—including those, such as this case, which turn almost entirely on disagreements between employees and their supervisors—into damage actions under the FELA. Accordingly, this Court should grant the Petition and resolve the inter-circuit conflict.

1. Railroad employee disputes are governed by the RLA, 45 U.S.C. § 151 *et seq.* The Act states that one of



its general purposes is "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." 45 U.S.C. § 151a(5).

This Court has held that 45 U.S.C. § 151a(5) covers "minor disputes." A minor dispute is one which involves either the meaning or application of the collective bargaining agreement or an employment dispute not covered by the agreement. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723 (1945).[5] As defined, "minor disputes" cover the broad range of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978).

This Court has made clear that, consistent with the RLA, 45 U.S.C. § 153 First (i), minor disputes must be submitted to the NRAB, which has exclusive jurisdiction to resolve them. *Andrews* v. *Louisville & N. R. Co.*, *supra*, 406 U.S. at 322, 325. As this Court stated in *Locomotive Engnrs.* v. *Louisville & N. R. Co.*, 373 U.S. 33, 38-39 (1963), the grievance procedures provided under the RLA constitute "a mandatory, exclusive, and comprehensive system for resolving grievance disputes . . . [and were] intended by Congress to be the complete and final means for settling minor disputes." *See also Union Pacific R. Co.* v. *Sheehan*, *supra*, 439 U.S. at 94.

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[5] As this Court explained in *Burley*, *supra*, 325 U.S. at 723, the RLA divides labor disputes into two categories: the first "major disputes" relates to "the formation of collective agreements or efforts to secure them," and the second, "minor disputes" relates the interpretation of a collective bargaining agreement or disputes "founded upon some incident of the employment relation." Under the RLA, major disputes are subject to the exclusive jurisdiction of the National Mediation Board (45 U.S.C. § 154), while minor disputes are subject to the exclusive jurisdiction of the NRAB (45 U.S.C. § 153). *Id.* at 722.

Respondent's allegations concerning his treatment by his foreman place this case right at the core of RLA coverage. This is a classic employer-employee dispute arising out of working conditions in the shop and events that occurred there. Indeed, before this FELA suit was ever filed, the respondent himself initiated a grievance under the RLA-mandated grievance procedures contained in Rule 39 of the collective bargaining agreement, a point which the court of appeals wholly ignored. The Ninth Circuit's holding therefore contains an unduly restrictive view of the scope of the grievance procedures that Congress intended to provide by its enactment of the RLA.

Congress made clear that the RLA is not to be interpreted narrowly. "The purpose of the RLA," Congress declared, is "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" (emphasis supplied). 45 U.S.C. § 151a(5). Consistent with Congress' mandate, courts have liberally construed the RLA's coverage. Thus, this Court has held that "disputes" under the RLA include "claim[s] . . . founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries." *Elgin, J. & E. R. Co.* v. *Burley, supra*, 325 U.S. at 723. Other federal courts—faithful to the mandate to interpret the scope of the RLA broadly—have held that railroad employee claims of intentional infliction of emotional distress,[6] retaliatory discharge,[7] and

[6] *See, e.g., Adkins* v. *Chesapeake & O. R. Co.*, No. 85-1204 (4th Cir., Oct. 3, 1985) (unpublished decision, App. 16a-17a); *Antalek* v. *Norfolk and Western Ry. Co.*, No. 84-3057 (6th Cir., Aug. 30, 1984) (unpublished decision, App. 22a-24a); *Choate* v. *Louisville & N. R. Co.*, 715 F.2d 369 (7th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc., supra*, 576 F.2d at 1369.

[7] *See, e.g., Minehart* v. *Louisville & N. R. Co.*, 731 F.2d 342 (6th Cir. 1984); *Landfried* v. *Terminal R. Ass'n of St. Louis*, 721 F.2d



slander[8] all constitute disputes subject to RLA grievance procedures. These holdings have included claims filed under the FELA.[9] The courts of appeals for several circuits have held that railway labor disputes which are "inextricably intertwined with the grievance machinery of the collective bargaining agreement" or are "arguably governed" by the collective bargaining agreement or which have a "not obviously insubstantial" relationship to it are disputes subject to RLA grievance procedures.[10] Read collectively, these cases make clear that it is the *source* of a railroad employee's alleged injury, and not the remedy which he might prefer to pursue, that determines whether a dispute is subject to the RLA.

The overly-narrow interpretation of the RLA applied by the court of appeals in this case conflicts with these

254 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1712 (1984); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1000 (1984).

[8] *See, e.g., Evans* v. *Missouri Pacific R. Co.*, 618 F. Supp. 930 (E.D. Mo. 1985); *Fraley* v. *Hayes*, 112 BNA LRRM 2298 (S.D. Ill. 1982); *Carson* v. *Southern Ry. Co.*, 494 F. Supp. 1104 (D.S.C. 1979).

[9] *See, e.g., Adkins* v. *Chesapeake & O. Ry. Co., supra*; *Antalek* v. *Norfolk and Western Ry. Co., supra*; *Lancaster* v. *Norfolk and Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985); *Landfried* v. *Terminal R. Ass'n of St. Louis, supra*; *Jackson* v. *Consolidated Rail Corp., supra*; *Sharkey* v. *Penn Central Transport Co.*, 493 F.2d 685, 688 (2d Cir. 1974); *Beanland* v. *Chicago, Rock Island & Pac. R.*, 480 F.2d 109, 113 (8th Cir. 1973).

[10] *See, e.g., Antalek* v. *Norfolk and Western Ry. Co., supra* (inextricably intertwined); *United Transp. Union* v. *Penn Central Transp. Co.*, 505 F.2d 542, 544-45 (3d Cir. 1974) (not obviously insubstantial); *Local 1477, United Transp. Union* v. *Baker*, 482 F.2d 228, 230 (6th Cir. 1973) (arguably); *Railway Express Agency* v. *Brotherhood of Railway, Airline & Steamship Clerks*, 459 F.2d 226, 231 (5th Cir. 1972) (arguably); *Airline Stewards & Stewardesses Ass'n* v. *Caribbean Atlantic Airlines, Inc.*, 412 F.2d 289, 291 (1st Cir. 1969) (not obviously insubstantial); *Southern R. Co.* v. *Brotherhood of Locomotive Firemen & Enginemen*, 384 F.2d 323, 327 (D.C. Cir. 1967) (not obviously insubstantial).

decisions as well with Congressional railway labor policy. Respondent's complaints concerning the actions of his foreman are the classic sort of work-related dispute which Congress intended to be—and courts have consistently held to be—exclusively subject to the grievance procedures mandated by the RLA. This reason alone warrants this Court's review of the Ninth Circuit's decision.

2. The decision in this case also conflicts with recent decisions of courts of appeals for four different circuits holding that a cause of action alleging solely emotional or non-physical injury is *not* cognizable under the FELA.

In three of these cases the courts of appeals held that claims for mental or emotional distress arising from workplace disputes are directly related to the employer-employee relationship and thus must be resolved pursuant to the grievance procedures required by the RLA. *Lancaster* v. *Norfolk and Western Ry. Co.*, 773 F.2d 807, 813-15 (7th Cir. 1985); *Adkins* v. *Chesapeake & O. Ry. Co.*, No. 85-1204 (4th Cir., Oct. 3, 1985) (unpublished decision, App. 16a-17a); *Antalek* v. *Norfolk and Western Ry. Co.*, No. 84-3057 (6th Cir., Aug., 30, 1984) (unpublished decision, App. 22a-24a).[11] In two other cases, the courts held that the FELA does not create a cause of action for retaliatory discharge and that the exclusive

[11] The fact that the decisions in *Adkins* and *Antalek* are presently unpublished does not diminish the significance of the conflict between the decision of the Ninth Circuit here and those of the Fourth and Sixth Circuits in those cases. The controlling fact is that railroad employees in the Fourth and Sixth Circuits with grievances identical to Mr. Buell's are required to raise their claims by means of the dispute-resolution procedures mandated by the RLA. Employees in the Ninth Circuit, by contrast, can raise any employment-based claims in court under FELA simply by alleging that those grievances have caused them emotional distress. Since that allegation is always available, railroad employer-employee disputes will be resolved one way in the nation's most populous circuit and another way in at least four other circuits.



remedy for such a claim lies in the RLA-mandated grievance procedures. *Landfried* v. *Terminal R. Ass'n of St. Louis*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1712 (1984); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983) *cert. denied*, 104 S. Ct. 1000 (1984).

These cases directly conflict with the Ninth Circuit's holding in this case that a claim for emotional or non-physical injuries is cognizable under the FELA even where such injuries allegedly arise out of a rail employee's disenchantment with the conduct of his foreman. As the district court found: "Plaintiff's injury flows directly from defendant's alleged failure to take appropriate disciplinary measures with regard to alleged misconduct by plaintiff's supervisor and several of his co-workers. This type of wrongdoing . . . is directly related to the employer-employee relationship" (App. 14a). Each of the above-cited decisions from four separate circuits stands squarely for the proposition that in a case such as the district court found this one to be—a claim of emotional, non-physical injury arising out of the employment relationship—the claim against the carrier does not lie under the FELA, but may be resolved only by RLA grievance procedures.

For example, the Seventh Circuit in *Lancaster* held that the FELA does not create a cause of action alleging solely emotional injuries. The opinion correctly notes that this interpretation avoids conflicts between the RLA and FELA because "the only torts [the FELA] provides a remedy for happen not to come within the scope of the Railway Labor Act" (773 F.2d at 815). As that court explained (*id.* at 807):

> The reason why the question whether the Railway Labor Act supplants any part of the Federal Employers' Liability Act tend not to arise may be the following: The FELA does not create a cause of action for tortious harms brought about by acts that

> lack any physical contact or threat of physical contact—an act such as telling a man he's fired, which is precisely the type of act for which the Railway Labor Act provides a swift and adequate remedy.

The Seventh Circuit in *Lancaster* noted that its interpretation of the FELA comports with a consistent line of decisions holding that actions for "non-physical" torts arising under state law are preempted by the RLA (773 F.2d at 815).[12] While the *Lancaster* court observed that "the question of where to draw the line between the Railway Labor Act and the Federal Employers' Liability Act is distinct from that of the scope of preemption of state tort law by the Railway Labor Act" (773 F.2d at 813), it was also of the view that "the two questions should be decided consistently." *Id.* The reason is that

> They involve the same underlying issue: whether the defendant's misconduct, although tortious, is the sort of conduct that Congress, if it had thought about the matter, would have wanted to channel through the grievance machinery set up by the Railway Labor Act; or instead the sort of conduct that Congress would have wanted to leave, concurrently or exclusively, to state or federal tort remedies. *Id.*

3. The Ninth Circuit's error ultimately rests on its failure to honor the principle of statutory construction that federal statutes are to be interpreted, if possible, so as not to create tension with other federal statutes. *See, e.g., Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862 (1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974). In this context, that objective is easily achievable, as the holdings of other federal courts attest. So long as the RLA is given its traditional, usually understood meaning as applicable to employer-employee, workplace type disputes (such as failure properly to con-

[12] The decisions cited in the *Lancaster* opinion are *Jackson* v. *Consolidated Rail Corp., supra*; *Minehart* v. *Louisville & N. R., supra*; *Beers* v. *Southern Pacific Transp. Co., supra.*



trol supervisory personnel) and the FELA is given its traditional, usually understood meaning as not applying to claims of emotional, non-physical injury, there may be some instances of tension between the two federal statutes, but they will be rare. This is attested by the fact that in two cases, *Adkins* and *Antalek* (both of which are indistinguishable from this case), the Fourth Circuit and the Sixth Circuit thought the law so well settled that there was no need to publish their opinions.[13]

The Ninth Circuit in this case, by contrast, has gone out of its way to create conflict between the two statutes by giving an unnecessarily crabbed interpretation to the RLA and an unnecessarily expansive interpretation to the FELA. It has thereby created an intolerable situation under which the availability of important federal rights to large numbers of people turns on the fortuity of the part of the country in which those persons happen to live. Disagreements between railroad workers and their supervisors over the proper performance of their respective duties are an inevitable consequence of running a railroad. Clearly, it was Congress' intent that such disputes be resolved by arbitration under the RLA, and most of the courts of appeals have upheld that intent. In the na-

[13] For the convenience of the Court, petitioner has reproduced in the Appendix the court of appeals' opinion in *Antalek* (App. 22a-24a), and the opinions of the court of appeals (App. 16a-17a), and the district court (App. 18a-21a), in *Adkins*. Mr. Adkins has filed a Petition for Certiorari, No. 85-1099. In the event the Court should grant both the *Adkins* petition and also this one, the cases could be consolidated for a single hour of oral argument. There is, however, no need to grant both cases because the two are indistinguishable. If the Court grants only one, as we suggest, this case is the better vehicle for resolving the issues. First, it is the Ninth Circuit, and not the Fourth, which reached an erroneous result that is inconsistent with the holdings of other courts of appeals. Second, the Fourth Circuit opinion is unpublished and contains no discussion of the relevant issues. Finally, it would appear that the record in this case may be better developed, so that the issues will be presented more sharply.

tion's largest circuit, however, disgruntled employees will be free to channel the most elementary disputes between supervisor and employee into court by a simple allegation of emotional injury. Only this Court can correct that error and prevent the mischief that it will cause.

## CONCLUSION

The petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX**

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

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No. 84-2288

JIM BUELL,
*Plaintiff-Appellant,*

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
a corporation,
*Defendant-Appellee.*

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Argued and Submitted April 9, 1985

Decided Sept. 19, 1985

Joseph J. Weninger, James R. McCall, Crow, Lytle, Gilwee, Donoghue, Adler & Weninger, Sacramento, Cal., for plaintiff-appellant.

John H. Ernster, Thomas D. Peterson-More, Atchison, Topeka & Santa Fe Railway Co., Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of California

Before SCHROEDER, NELSON, and REINHARDT, Circuit Judges.

SCHROEDER, Circuit Judge.

Jim Buell appeals from the district court's grant of summary judgment in favor of the Atchison, Topeka and

Santa Fe Railway Company. The issue, one of first impression in this circuit, is whether a Railroad employee's wholly mental injury stemming from his railroad employment is compensable under the Federal Employer's Liability Act (FELA or the Act), 45 U.S.C. §§ 51-60 (1982).

Buell, a carman at the Railroad's Stockton Yard, was a member of the Brotherhood of Railway Carmen (the Union) and covered by a collective bargaining agreement between the Union and the Railroad. In October 1981, Buell had an emotional breakdown and was admitted to a hospital where he was diagnosed as suffering from major depression and a passive-aggressive personality disorder. He remained hospitalized for seventeen days and could not return to work until October 1982.

Buell alleges that his emotional breakdown was caused by the harassment, threats, and intimidation he suffered while employed at the Railroad. The primary source of this friction, he asserts, was his immediate supervisor, but he also alleges that fellow employees harassed, threatened, and intimidated him. The gravaman of Buell's complaint is that he was injured because his supervisor and co-workers intentionally and negligently harassed and abused him, and that the Railroad negligently failed to stop this harassment and abuse even after Buell and other workers complained about these actions to appropriate Railroad officials.

Section 1 of the FELA, 45 U.S.C. § 51, provides that "[e]very common carrier by railroad . . . shall be liable in damages to [employees] . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ." The FELA is a departure from the fellow servant rule and other limitations of the common law and seeks to adjust the cost of injury equitably between the worker and the Railroad. *Sinkler v. Missouri Pacific Railroad*



*Co.*, 356 U.S. 326, 329-330, 78 S.Ct. 758, 762, 2 L.Ed.2d 799 (1958). The FELA "was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 507, 77 S.Ct. 443, 449, 1 L.Ed.2d 493 (1957) (footnote omitted), *quoted in Heater v. Chesapeake & Ohio Railway Co.*, 497 F.2d 1243, 1246 (7th Cir.), *cert. denied*, 419 U.S. 1013, 95 S.Ct. 333, 42 L.Ed. 2d 287 (1974). Thus, the FELA views the railroad "as a unitary enterprise, its economic resources obligated to bear the burden of *all injuries* befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." *Sinkler, supra*, 356 U.S. at 330, 78 S.Ct. at 762 (emphasis added).

In light of this intended scope, the concept of "injury" under the FELA is extremely broad; the Act encompasses all reasonably foreseeable injuries which result from a railroad's failure to exercise due care with respect to its employees. *See* 32 Am.Jur.2d *Federal Employers' Liability and Compensation Acts* § 23 (1982), at 352.

Injuries compensable under the FELA are not limited to those arising from sudden accidents. In *Urie v. Thompson*, 337 U.S. 163, 186, 69 S.Ct. 1018, 1033, 93 L.Ed. 1282 (1949), the Supreme Court concluded that to be compensable under the Act, an "injury" need not be inflicted by "external, violent or accidental" means. The Court held that silicosis, an occupational disease caused by continuous inhalation of silica dust, is an "injury" as that term is used in the FELA "when it results from the employer's negligence." *Id.* at 180, 69 S.Ct. at 1030, 93 L.Ed. 1282 (1949). The Court recognized that the Congress, in enacting the FELA, primarily focused on injuries caused by sudden accidents. *Id.* at 181, 69 S.Ct.

at 1030. But, the Court noted, such injuries "were not the only ones likely to occur." *Id.*

> On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable. The wording was not restrictive as to the employees covered; the cause of injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting.

*Id.* The Court went on to state that restrictive interpretation of the Act would conflict with the Act's purpose:

> restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court.

*Id.* at 181-82, 69 S.Ct. at 1030-31 (footnote omitted).

Relying on *Urie*, the court in *Randall v. Reading Co.*, 344 F.Supp. 879, 881-82 (M.D.Pa.1972), held the conduct of the employer or his agent giving rise to injury need not involve physical contact. In *Randall*, the jury found that the railroad negligently failed to furnish prompt medical attention to an employee who suffered a heart attack. The court denied the railroad's motion for a new trial or JNOV and noted that to recover under the FELA an employee need not suffer "bodily injury." To read such a precondition into the Act, the court stated, would "depart radically from the language of the statute itself and . . . erect what amounts to an 'impact rule' for recovery under the [FELA]." 344 F.Supp. at 882. *See also Williams v. Atlantic Coast Line Rail Co.*, 190 F.2d 744, 748 (5th Cir.1951); *Miller v. Elgin, Joliet & Eastern Ry Co.*, 177 F.2d 224 (7th Cir.1949); *Stewart v. Baltimore & O.R. Co.*, 137 F.2d 527 (2d Cir.1943). These



authorities support the conclusion that an injury compensable under the Act need not result from a physical impact.

Also relying on *Urie*, the California Supreme Court has expressly recognized that a mental injury may be compensable under the FELA. *See McMillan v. Western Pacific Railroad Co.*, 54 Cal.2d 841, 9 Cal.Rptr. 361, 357 P.2d 449 (1960). In *McMillan*, the plaintiff, a train dispatcher, alleged that his employer negligently subjected him to working conditions of unusual responsibility, stress and tension by requiring him to operate the railroad's central traffic control system. He alleged that the stressful job conditions caused him to suffer a nervous breakdown which rendered him " 'sick, sore, lame and disabled.' " *Id.* at 841, 9 Cal.Rptr. at 361, 357 P.2d at 449. The California Supreme Court reversed the trial court's dismissal for failure to state a claim. The court noted that "injury" as used in the FELA "is not qualified by 'accidental' or 'bodily' or any other modifying word or words." *Id.* at 843, 9 Cal.Rptr. at 362, 357 P.2d at 450. It found the allegation in the complaint sufficient to state a FELA claim. *Id.* at 845, 9 Cal.Rptr. at 362-63, 357 P.2d at 450-51. We conclude that the complaint in this case similarly states a claim under the FELA.

The district court granted the Railroad's motion to dismiss because it believed that Buell's claim constituted a "minor dispute" within the exclusive jurisdiction of the National Railroad Adjustment Board (Adjustment Board) pursuant to the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188. *See* 45 U.S.C. § 153 First (i) (1982); *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 322-25, 92 S.Ct. 1562, 1564-65, 32 L.Ed.2d 95 (1972). It relied on a series of cases in which employees had been discharged and sought, in addition to lost wages in proceedings under the RLA, tort damages under state law for emotional injuries. *See Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Mag-*

*nuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed. 2d 323 (1978). *See also Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1000, 79 L.Ed.2d 233 (1984); *Landfried v. Terminal Railroad Association*, 721 F.2d 254 (8th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1712, 80 L.Ed.2d 185 (1984). In each of these cases, a collective bargaining agreement between the railroad and the employee's union protected the employee from wrongful discharge. These cases hold that the employee's exclusive remedy for a wrongful discharge claim which is premised on a collective bargaining agreement lies with the Adjustment Board. The Board may order reinstatement and payment of lost wages, but may not order damages for emotional injury. *See Sharkey v. Penn Central Transportation Co.*, 493 F.2d 685 (2d Cir.1974).

As we noted in *Magnuson*, if the gravaman of an employee's complaint is his wrongful discharge, "the complaint involves a minor dispute which must be arbitrated following the procedures of the R.L.A." *Magnuson*, 576 F.2d at 1369. We also noted that an employee "who believes he has a legitimate grievance will doubtless have some emotional anguish," *id.*, but "[a]rtful pleading cannot conceal the reality that the gravaman of the complaint is wrongful discharge." *Id.* We concluded that a controversy is a "minor dispute" within the exclusive jurisdiction of the Adjustment Board where "the alleged misfeasance of the Railroad employees is . . . 'arguably' governed by the collective bargaining agreement or has a 'not obviously insubstantial' relationship to the labor contract." *Id.* at 1369-70.[1] In such cases, state law remedies are generally held to be preempted by the RLA.

[1] This court recently stated that a "minor dispute" "involv[es] 'grievances over the "meaning or proper application of a particular provision" in a collective bargaining agreement. . . .'" *International Association of Machinists & Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir. 1985) (quoting *Air Line Pilots Assocation v. Texas International Airlines*, 656 F.2d 16, 20 n. 6 (2d Cir. 1981)).



The plaintiff in this case, however, is not seeking additional relief under state law for a matter cognizable under the RLA and within the exclusive jurisdiction of the Adjustment Board. Buell is suing under a federal statute, i.e., the FELA, for injuries he suffered at the workplace. His complaint does not constitute a "minor dispute" within the exclusive jurisdiction of the Board because it is neither related to the collective bargaining agreement nor arguably governed by its provisions. Adjudication of the complaint will not involve the district court in the interpretation or application of the collective bargaining agreement any more than would any other suit under the FELA. The question before us is therefore not whether a state law claim is preempted by federal law but whether there is any reason under federal law to limit a railroad employee's right to relief under the FELA for emotional injury. We conclude that there is none.

The body of law which has developed under the RLA, upon which the Railroad relies, does not bar railroad employees from asserting claims under the FELA for mental, as opposed to physical, injuries. There is no rationale for such a holding. Indeed, damages for emotional distress accompanying physical injuries are recoverable in traditional FELA actions. *See Erie R. Co. v. Collins*, 253 U.S. 77, 87, 40 S.Ct. 450, 453, 64 L.Ed. 790 (1920); *Bullard v. Central Vermont Railway, Inc.*, 565 F.2d 193, 197 (1st Cir.1977). We hold that where an employee has suffered an injury attributable to employer negligence, the injury is compensable under the FELA regardless of its characterization as mental or physical.

Buell has stated a claim within the purview of FELA, and he is entitled to proceedings on the merits.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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No. CIV. S-82-776 RAR

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JIM BUELL,

*Plaintiff,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

*Defendant.*

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ORDER

[Filed July 12, 1984]

*PROCEDURAL BACKGROUND*

In the present action, plaintiff, JIM BUELL, seeks to hold his employer, the ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY ("railroad") liable under the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51, *et seq.*, for certain personal injuries which plaintiff allegedly sustained. After completion of discovery, defendant moved for summary judgment on the ground that this Court lacked subject matter jurisdiction over the action because the action either constituted a "minor dispute" within the meaning of the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.*, or was inextricably intertwined with the grievance machinery of the RLA.

Defendant's motion came on regularly for hearing before the undersigned on April 23, 1984. Joseph Weninger, Esq., appeared as counsel for plaintiff and Thomas Peterson-More, Esq., appeared as counsel for defendant. At the conclusion of the hearing, the Court orally denied



defendant's motion but subsequently issued a written memorandum directing the parties to submit supplemental briefs. The supplemental briefs having been duly submitted and considered in conjunction with the prior memoranda and oral arguments, the Court hereby GRANTS defendant's motion for summary judgment.

*FACTUAL BACKGROUND*

The facts which give rise to this lawsuit, when stated in a light most favorable to plaintiff, are as follows: At all times relevant to this lawsuit, plaintiff worked as a carman at defendant's Stockton yard, was a member of the Brotherhood of Railway Carmen ("union"), and was covered by a collective bargaining agreement between the union and the railroad.

On October 13, 1981, plaintiff was admitted to St. Joseph's Hospital in Stockton, California where he was diagnosed as suffering from major depression, a passive-aggresive personality disorder, and moderate obesity. Plaintiff was hospitalized for 17 days, and was not released to return to work until October 1, 1982.

Plaintiff believes that his mental breakdown was caused by harassment inflicted upon him at his place of employment. In particular, plaintiff alleges that the primary source of friction was plaintiff's immediate supervisor, Mr. Ed Wright. (Plaintiff's Deposition pp. 21-30). Apparently shortly after Mr. Wright began working at the Stockton yard in September, 1979, he began insisting that plaintiff and other similarly situated carmen complete certain car inspection reports in a manner which conflicted with the manner specified by Mr. Wright's supervisor, Mr. Messick. This conflict rendered it impossible for the carmen to satisfy both superiors and subjected them to constant reprimands from one supervisor or another. Another source of tension between plaintiff and Mr. Wright was the latter's practice of requiring that plaintiff help him remove company property (e.g., ice and

scrap plywood) from the yard. Plaintiff resented being required to assist with what he believed to be illegal conduct.

Apparently, plaintiff and others informally complained about Mr. Wright's conduct, but without noticeable success. Still dissatisfied, several carmen, including plaintiff, enlisted the aid of their union representatives to draft a written grievance about Mr. Wright sometime in the first part of 1981. (Plaintiff's Deposition p. 49). In response thereto, Mr. Messick's supervisor, Mr. Pichelman, convened a meeting at which the complaints about Mr. Wright's harassment, intimidation, and stealing were aired. (Plaintiff's Deposition p. 60). That the meeting did not put an end to the harassment is indicated by a letter dated June 5, 1981 from Mr. Peter Brooker, General Chairman of the Brotherhood of Railway Carmen, and sent to Mr. Pichelman. (Defendant's Memorandum of Points & Authorities, Exhibit D). This letter states that the union had received several complaints concerning Mr. Wright since the first meeting and demanded that Mr. Wright "change his tactics completely".[1]

According to plaintiff, yet another source of friction was plaintiff's co-workers themselves. One evening not long before plaintiff's mental breakdown plaintiff discovered that an unsigned cartoon drawing had been posted at several places in the yard. This drawing depicted a hippopotamus wearing overalls and a railroadman's cap and contained the caption, "carman of the month: Jim Buell". Plaintiff believes that the railroad failed to take appropriate disciplinary measures against the individual who later admitted responsibility for the drawing, Mr. Al Williams. (Plaintiff's Deposition p. 85; Ed Wright Deposition p. 54). On a different occasion, plaintiff noticed that someone had erased plaintiff's name from

[1] What further action, if any, was taken with regard to the complaints about Mr. Wright's conduct cannot be ascertained from the present record. (Plaintiff's Deposition pp. 130-135).



his time card and substituted the name "Porky." (Plaintiff's Deposition p. 87). In response, Mr. Wright verbally reprimanded the carmen as a group.

*DISCUSSION*

The issue raised by defendant's motion involves determining which of two federal statutory schemes applies to the facts as stated above. If, as plaintiff contends, these facts are encompassed by the FELA, then this Court has subject matter jurisdiction.[2] The reverse is true if these facts fall within the terms of the RLA. 45 U.S.C. § 153 First (i); *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 322 (1972); *Brotherhood of Locomotive Eng. v. Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963).

Although the narrow question of the availability to an employee covered by the RLA of a FELA remedy based on an alleged negligent failure to maintain a safe workplace is one of first impression in this circuit, there are helpful precedents concerning related statutory schemes. In *Andrews, supra*, the Supreme Court ruled that an employee who was covered by the RLA could not bring in the first instance a wrongful discharge claim where that claim was based on the collective bargaining agreement.

Five years later the Supreme Court reached a different result in the context of the National Labor Relations Act

[2] The Federal Employers Liability Act imposes civil liability on railroad carriers for injuries sustained by their employees arising from the carriers' negligence. It provides in pertinent part:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . .

45 U.S.C. § 51.

(NLRA). *Farmer v. United Broth. of C & J of Am., Local 25*, 430 U.S. 297 (1977) held that the NLRA did not preempt a state tort action for intentional infliction of emotional distress brought by a union officer on account of alleged harassment by the union. The Supreme Court recognized that the state had a substantial interest in protecting its citizens from the kind of abuse about which the plaintiff complained and reasoned that that interest outweighed the risk of interference with the federal regulatory scheme. The Court warned, however, that any claim which posed a "realistic threat of interference with the federal regulatory scheme" would not be permitted. *Id.*, at 305.

In *Magnuson v. Burlington Northern Inc.*, 576 F.2d 1367 (9th Cir. 1978) the Ninth Circuit applied the *Andrews/Farmer* analysis to a common law claim for intentional infliction of emotional distress brought by an employee covered by the RLA. Plaintiff, who had been discharged after his employer had concluded that he was responsible for a train collision, sued in state court to recover for his emotional distress allegedly caused by the railroad defendants' conspiracy to conceal their own responsibility for the collision. After the defendants removed the action to federal court, the district court dismissed for lack of subject matter jurisdiction. The Ninth Circuit affirmed, explaining:

> Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge. If the pleading of emotional injury permitted aggrieved employees to avoid the impact of the R.L.A., the congressional purpose of providing a comprehensive scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted.

*Id.*, at 1369. It also rejected plaintiff's argument that the complaint fell within the narrow exception created by *Farmer*. In contrast to *Farmer* where the wrongful



conduct was only peripherally related to federal law and affected substantial state interests, the *Magnuson* action was "based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A." *Id.* Here plaintiff's secondary complaints about defendants' abuses of the investigatory process and denial of plaintiff's right to a fair hearing were directly related to the collective bargaining agreement and therefore constituted a minor dispute within the meaning of the RLA.

The Ninth Circuit adhered to the broad view of the scope of the RLA it had taken in *Magnuson* in the recent decision of *Beers v. So. Pac. Tranp. Co.*, 703 F.2d 425 (9th Cir. 1983). In *Beers*, plaintiff was discharged for insubordination arising from his failure to apologize for an incident in which he insulted a superior. Plaintiff sought redress both by pursuing the grievance procedures afforded by the RLA and by filing an action for intentional infliction of emotional distress in state court. As was the case in *Magnuson*, the action was removed to federal court where it was dismissed for lack of subject matter jurisdiction. Again the Ninth Circuit affirmed.

The Ninth Circuit rejected plaintiff's argument that the emotional distress claim came within the *Farmers* exception because his claim was not covered by any provision of the collective bargaining agreement and the remedy sought (monetary damages) was not covered by the labor contract. It declared that the critical inquiry was whether the controversy could have been presented to the NRAB. Because this controversy could have been so presented, it was a "minor dispute" within the meaning of the RLA over which the federal court had no jurisdiction.[3]

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[3] This Court notes that the Ninth Circuit did very recently hold that a claim for wrongful termination based on public policy was not preempted by the Labor Management Relations Act (LMRA). *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 367 (9th Cir. 1984). However, in a footnote it cited *Magnuson* with approval and en-

When these precedents are applied to the instant case, it becomes apparent that plaintiff's claim falls within the purview of the RLA. Plaintiff's injury flows directly from defendant's alleged failure to take appropriate disciplinary measures with regard to alleged misconduct by plaintiff's supervisor and several of his co-workers. This type of wrongdoing, like the allegations of conspiracy to cover-up wrongdoing in *Magnuson* and the allegations of failure to conduct a full and fair investigation in *Beers*, is directly related to the employer-employee relationship. Plaintiff has never suggested that he could not have invoked the grievance procedures contained in the collective bargaining agreement to address the harassment he was suffering.[4] On the contrary, the fact that union representatives did submit a written grievance with regard to the perceived harassment by Mr. Wright indicates that the grievance procedures did apply to this type of dispute.

Plaintiff's argument that the relief sought here differs from that available under the collective bargaining agreement and the RLA misses its mark. *Magnuson* and *Beers* teach us that the Court must focus on the *source* of the injury rather than on the type of desired relief. Because the injury here had its genesis in a labor problem which constitutes a minor dispute within the meaning of the RLA, this Court is without jurisdiction to entertain plaintiff's claim.

That plaintiffs' injuries are substantial and that the passage of time might bar other avenues of relief are realities of which this Court is painfully aware. How-

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dorsed the reasoning of the Seventh Circuit in *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (91983) *cert. denied*, —— U.S. ——, 104 S.Ct. 1000 (1984). *Jackson* recognized that the case for preemption was stronger in the context of the RLA than other federal labor laws. *Garibaldi*, at 1371 n.6. *Garibaldi* also cited *Beers* with approval. *Id.* at 1373, n.8.

[4] Rule 39 of the collective bargaining agreement provides detailed procedures for processing grievances.



ever, to rule in plaintiff's favor would contravene the clear teaching of *Magnuson* that courts must prevent artful litigants from thwarting the congressional purpose of providing a comprehensive scheme for the settlement of employer-employee disputes in the railroad industry without resort to the courts. Defendant's motion for summary judgment is therefore GRANTED.

The Clerk of the Court is hereby directed to enter judgment for defendant accordingly.

IT IS SO ORDERED.

DATED: July 12, 1984.

/s/ Raul A. Ramirez
RAUL A. RAMIREZ
United States District Court
Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 85-1204

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GLEN ADKINS,
*Appellant,*

versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a foreign corporation and W. T. BRADY,
*Appellees.*

---

Appeal from the United States District Court for the
Southern District of West Virginia,
at Huntington
Robert J. Staker, District Judge
(C/A 83-3488)

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Argued: July 15, 1985 Decided: October 3, 1985

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Before RUSSELL, SPROUSE and WILKINSON, Circuit Judges.

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Paul Perfater (Stephen P. Meyer; Meyer & Perfater on brief) for Appellant; Barbara Lee Ayres (William C. Beatty; Huddleston, Bolen, Beatty, Porter & Copen on brief) for Appellees.

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PER CURIAM:

In this civil action, appellant Glen Adkins seeks to recover from appellees Chesapeake and Ohio Railway Company and W. T. Brady damages for intentional infliction of emotional distress for injuries and distress suffered by appellant while in the employ of the railroad and while under the supervision of Mr. Brady. After a review of the record, consideration of the briefs, and following oral argument, we find that the district court properly held that appellant's claim arises under the exclusive jurisdiction of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1983), and is one that is subject exclusively to the administrative process of the Railway Labor Act. Accordingly, we affirm on the opinion of the district court. *Adkins v. Chesapeake and Ohio Railway Co.*, C/A No. 83-3488 (S.D.W.Va. Feb. 11, 1985).

*AFFIRMED.*

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

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Civil Action No. 83-3488

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GLEN ADKINS,

*Plaintiff,*

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a foreign corporation, and W. T. BRADY,

*Defendants.*

---

MEMORANDUM OPINION AND ORDER

[Entered February 11, 1985]

Plaintiff Glen Adkins is an employee of defendant Chesapeake and Ohio Railway Company (C&O) who seeks to recover damages for mental distress and a spastic colon allegedly caused by the harassment of his supervisor at work, defendant W. G. Brady, whose conduct the plaintiff further alleges was known or should have been known to C&O. Plaintiff brought an action in the Circuit Court of Logan County, West Virginia, against C&O and Brady pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51. Plaintiff alleges that C&O violated the FELA by failing to provide him a safe place to work. Defendants removed the action to this court invoking jurisdiction under the Railway Labor Act (RLA), 45 U.S.C. § 151.

Plaintiff has moved to remand the action to state court on grounds that removal of a FELA action is precluded by 28 U.S.C. § 1445(a) which provides: "A civil action in any State court against a railroad or its receivers or



trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States." Defendants, on the other hand, contend that this action arises under the RLA and not the FELA and that plaintiff's exclusive remedy under the RLA is the grievance and arbitration process. Plaintiff has filed a grievance which remains in arbitration. Defendants move for summary judgment on these grounds. The court denies plaintiff's motion to remand and grants summary judgment in favor of defendants.

Defendants have supplied the court and opposing counsel copies of three recent decisions all of which hold that claims like those sought to be asserted by the plaintiff herein do not arise under the FELA but are within the exclusive province of the RLA. In *Antalek v. Norfolk & Western Ry. Co.*, No. 82-427 (N.D. Ohio December 28, 1983), *affirmed*, No. 84-3057 (6th Cir. Aug. 30, 1984) (unpublished order) plaintiff brought suit under the FELA alleging that harassment by railway foremen and supervisors had caused him mental anguish, emotional distress and physical injuries requiring hospitalization. The railway moved to dismiss the complaint on grounds that plaintiff's claim was for wrongful discharge and within the exclusive jurisdiction of the RLA. The court held that the gravamen of the plaintiff's complaint, the tort of intentional infliction of emotional harm, was not actionable under the FELA and accordingly dismissed plaintiff's FELA claim.

In *Scales v. National Railroad Passenger Corp.*, No. 84-0540 (E.D. Pa. April 23, 1984), plaintiff brought suit under the FELA in state court against the railroad and his former supervisor alleging intentional and negligent infliction of emotional distress caused by harassment in connection with baseless disciplinary proceedings. Defendants removed the action to federal court asserting original jurisdiction under the RLA. Plaintiff moved to

remand to state court. The court denied the motion to remand ruling that plaintiff's claims of harassment were within the exclusive province of the RLA.

And in *Buell v. Atchison, Topeka and Santa Fe Ry. Co.*, No. S-82-776 RAR (E.D. Calif. July 12, 1984), plaintiff sought damages under the FELA for a mental breakdown which he alleged to be caused by his supervisor and co-employees. Plaintiff sought to hold the railway liable for its alleged failure to take appropriate disciplinary measures against his antagonists. The railway moved for summary judgment. The court ruled that the wrongdoing alleged by plaintiff related directly to the employer-employee relationship. Because the injury had its genesis in a labor problem which constitutes a minor dispute within the meaning of the RLA, the court granted defendant's motion for summary judgment.

In light of this precedent, the court holds that plaintiff's claims for mental distress and colitis arising from the alleged harassment by his supervisor are directly related to the employer-employee relationship and are within the exclusive province of the RLA. *See also Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978). Accordingly, plaintiff's exclusive remedy lies within the administrative process of the RLA. *See Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972).

For the foregoing reasons, it is hereby ORDERED that the motion of the plaintiff to remand this action to the Circuit Court of Logan County, West Virginia, be, and the same hereby is, DENIED and OVERRULED. It is further ORDERED that the motion of the defendants for summary judgment be, and the same hereby is, SUSTAINED.



The clerk of the court is directed to mail a certified copy of this order to all counsel of record.

ENTER:

/s/ Robert J. Staker
ROBERT J. STAKER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 84-3057

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ROBERT A. ANTALEK; MARY ANTALEK,
*Plaintiffs-Appellants,*

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
*Defendant-Appellee.*

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[Filed August 30, 1984]

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ORDER

BEFORE: KENNEDY, Circuit Judge; PHILLIPS, Senior Circuit Judge; and WOODS, District Judge *

This matter is before the Court upon plaintiffs' appeal from the district court's order dismissing the complaint. On July 15, 1982 plaintiffs filed a complaint alleging that this action for intentional infliction of emotional distress arises under the Federal Employee's Liability Act, 45 U.S.C. § 51 *set seq.* (FELA). Specifically, the complaint alleges that various supervisors, with the knowledge of railroad management, engaged in a course of harassment, intimidation and conspiracy to terminate Antalek's em-

* The Honorable George Woods, United States District Judge for the Eastern District of Michigan, sitting by designation.



ployment. Mrs. Antalek alleges loss of consortium. Plaintiffs are seeking monetary damages. The defendant filed a motion to dismiss arguing that Antalek's claims are subject to the exclusive jurisdiction of the National Railroad Adjustment Board (NRAB) under the Railway Labor Act (RLA), 45 U.S.C. § 153. Plaintiffs subsequently filed a motion to amend the complaint. Defendant opposed the motion. By order dated December 28, 1983 the district court granted the motion to dismiss acknowledging that Antalek's claim was subject to the exclusive jurisdiction of the NRAB and holding that the claim was not actionable under the FELA.

Defendant has requested that this Court take judicial notice of Antalek's petition before the Public Law Board (PLB) and the complaint filed in state court against W.A. Froelich, M.D.

Initially the Court notes that it takes judicial notice of the aforementioned documents pursuant to Rule 201 (d) and (f), Federal Rules of Evidence. This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After an examination of the briefs and record, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Upon careful consideration, this Court concludes that Antalek's claim for intentional infliction of emotional distress is a "minor dispute" within the purview of the RLA and, therefore, exclusive jurisdiction lies in the hands of the NRAB. *Andrews v. Louisville & Nashville Railroad*, 406 U.S. 320 (1972); *McKinney v. International Association of Machinists*, 624 F.2d 745 (6th Cir. 1980). Antalek's claims alleging intentional infliction of emotional distress, are "inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A." *Magnuson v. Burlington Northern Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Beers v. Southern Pacific Trans-*

*portation Co.*, 703 F.2d 425 (9th Cir. 1983); *Choate v. Louisville & Nashville Railroad Company*, 715 F.2d 369 (7th Cir. 1983). Moreover, Antalek can not simultaneously maintain a suit in the federal courts and before the PLB. *Minehart v. Louisville & Nashville Railroad Co.*, 731 F.2d 342 (6th Cir. 1984).

This Court further concludes that the district court correctly determined that the tort of intentional infliction of emotional distress is not actionable under the FELA. The basis of Antalek's complaint is the alleged intentional acts of harassment by defendant which ultimately caused emotional harm. This tort is not contemplated by the line of cases which allow recovery under the FELA for an intentional tort which inflicts bodily injury. *Jamison v. Encarnacion*, 281 U.S. 635 (1930); *Harrison v. Missouri Pacific Railroad*, 372 U.S. 248 (1963) (per curiam); *Brooks v. Washington Terminal Co.*, 593 F.2d 1285 (D.C. Cir.), *cert. denied*, 442 U.S. 910 (1979).

Accordingly, it is ORDERED that the district court's order be, and is hereby, affirmed. It is further ORDERED that the motion requesting the Court to take judicial notice of certain documents be, and is hereby, granted.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk



**45 U.S.C. § 153. National Railroad Adjustment Board**

**First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review.** There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act [enacted June 21, 1934], and it is hereby provided—

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

# COLLECTIVE BARGAINING AGREEMENT BETWEEN THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY AND THE BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA

## GRIEVANCES

### Rule 39

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances. Only the employee or the duly authorized representative of his craft may handle a grievance.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the



highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employe and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to.

(d) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

(e) This rule recognizes the right of representatives of the Organizations, parties hereto, to file and prosecute claims and grievances for and on behalf of the employes they represent.

(f) This Agreement is not intended to deny the right of the employes to use any other lawful action for the

settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier.

(g) This rule shall not apply to requests for leniency.

(h) The provisions of this Rule 39 may be reconsidered at any time upon request of either party without serving the required notice for a general revision of the Agreement, but this does not bind either party to agree to any change in these provisions.

# OPPOSITION

# BRIEF

Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1140

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Petitioner,*

vs.

JIM BUELL,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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4212P

## QUESTIONS PRESENTED

1. Should the existence of a general provision for grievance procedures in a collective bargaining agreement eliminate, as a matter of law, an injured railroad worker's right, specified in the Federal Employers' Liability Act ("FELA") to bring a negligence action against his employer in federal court?

2. Should this Court review a decision on an asserted ground of error premised upon a questionable reading of an unfocused factual findings by lower courts and which involves no direct conflict between the opinions of the United States Circuit Courts?

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No. 85-1140

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Petitioner,*

vs.

JIM BUELL,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Jim Buell hereby responds to the petition for a writ of certiorari filed in this litigation by petitioner Atchison, Topeka and Santa Fe Railway Company ("Santa Fe").

## OPINIONS BELOW

The decision of the United States Court of Appeal for the Ninth Circuit that Santa Fe petitions this Court to review is included in the Appendix to this Brief (App. 1a-7a), and is reported at 771 F.2d 1320 (1985). The opinion of the United States District Court in this matter (App. 8a-15a) is unreported.

## STATUTES INVOLVED

Section 1 of the FELA, 45 U.S.C. section 51, provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . . .

Section 5 of the FELA, 45 U.S.C. section 55, provides in pertinent part:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . .

## STATEMENT OF THE CASE

As the statement of the facts contained in the Ninth Circuit opinion reveals, Buell alleges he was injured as the result of "harassment, threats, and intimidation he suffered while employed at the [Santa Fe] Railroad". (App. 2a) The primary source of the harassment, threats and intimidation that injured Buell was Buell's workplace supervisor, Ed Wright, and the harassment, threats, and intimidation were visited upon Buell at the workplace while he was performing his job as a carman. Buell was on one occasion also harassed by some of his fellow employees in the workplace.

Although a group of carmen and the carmen's union that represents Buell complained about Wright's threatening and intimidating conduct toward Buell and other members of Buell's workcrew, Santa Fe either neglected or chose to take no action to change Wright's abusive and threatening manner of supervising the workplace operation. (Ninth Circuit Opinion (App 2a) and District Court Opinion (App 10a)) Buell's nervous breakdown was severe, requiring hospitalization for 17 days. Buell was not allowed by his psychiatrist to return to work for a year (October 13, 1981 to October 1, 1982). (Ninth Circuit Opinion App 2a).

Following the completion of some discovery procedures, Santa Fe filed a motion to dismiss before the District Court based solely



upon what it referred to as the "preclusive" legal effect of the Santa Fe-carmen's union collective bargaining contract upon Buell's FELA rights. (See Santa Fe's Motion to Dismiss (App 26a), the District Court Opinion (App 11a)—statement of the sole issue raised by Santa Fe's motion to dismiss, and the Ninth Circuit's observation (App 5a) that the District Court granted the Santa Fe motion to dismiss on the exclusive ground that Buell's claim was a "minor dispute" concerning the terms of the collective bargaining agreement and therefore could not be the subject of an FELA action.) Because the nature, extent and specific mechanics of the causation of the psychiatric injury suffered by Buell was not brought in issue by Santa Fe's legal argument, the record as summarized by the District Court and the Ninth Circuit does not fully reflect the actual record that was developed upon discovery regarding these points. However, the Ninth Circuit opinion does reflect the seriousness of Buell's psychiatric injury and the fact that Buell alleges that the injury was caused by the "harassment, threats, and intimidation" Buell suffered at the hands of Wright, his supervisor. (App 2a)

The Santa Fe motion for dismissal asserted that because a line of federal court decisions has held that state statute and state court created causes of action are preempted by the grievance procedures established by the Railway Labor Act, the cause of action for negligence given to employees in the FELA is also, somehow, preempted. For obvious reasons, Santa Fe chose not to use the word "preempted" to describe the effect it argued that the RLA grievance procedures had on FELA created rights. Instead Santa Fe argued that the collective bargaining agreement had a "preclusive" effect upon the right of Buell to seek redress under the FELA. (App 26a)

The District Court, while acknowledging that Buell's injuries "are substantial" (App 14a), held that the collective bargaining agreement grievance procedures eliminated any FELA created rights Buell might have had, and granted Santa Fe's motion to dismiss. The fact that Buell's injury was psychiatric in nature was of no importance to Santa Fe in its motion, nor was it of any importance to the District Court in granting that motion.

Before the Ninth Circuit, both parties briefed and argued the issue of whether the District Court had erred in viewing Buell's FELA cause of action as one that had no greater standing vis-a-vis the RLA than a state created right. In its opinion, the Ninth Circuit corrected the District Court's error, noting that the FELA is a federal statute creating a federal cause of action and that the law of preemption is not applicable in considering the reconciliation of two federal statutes, such as the FELA and the RLA. (App 5a-7a) The lower court was accordingly reversed, and the case remanded for further proceedings. (App 7a) Although the issue had not been briefed, the Ninth Circuit also took the opportunity to announce its well researched and considered view that damages resulting from non-physical injuries are recoverable under the FELA. Thus, a FELA covered employee who suffers such an injury can assert his federal statutory right for recovery for that injury if it is the result of employer negligence. (App 2a-5a)

Santa Fe has petitioned this Court for a writ of certiorari, asserting two grounds of alleged error. The first asserts that the Ninth Circuit's rejection of the "preclusion" or preemption holding of the District Court was incorrect. (Petition, pages 8-12) The second ground claims that the FELA is not applicable to psychiatric injury suffered by a railroad worker due to negligence on the part of his supervisor and/or the executives of the railroad. (Petition, pages 12-16)

## ARGUMENT

There is no question that the FELA is not preempted by the RLA, or by any provisions in any collective bargaining agreement written under the RLA. Although written in a more sophisticated fashion than the motion to dismiss in the District Court on this point, the first ground of error in the Santa Fe petition remains just as fallacious. It is not at all surprising that circuit courts are in virtually complete agreement on this point.

While the issue of whether psychiatric injury is compensable under the FELA has never been directly addressed by this Court, its past decisions, most particularly *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), leave little doubt that such injury is compensable under the statute. On this issue there is no real conflict between the circuit courts, and regarding the type of common law assault conduct Buell alleged in this action, there is no conflict at all.



### 1. Grievance procedures set forth in a collective bargaining agreement authorized by the RLA do not "preclude" or in any way prevent an employee from asserting rights he or she has been given by Congress in the FELA.

As the Ninth Circuit definitively held, a railroad employee's FELA right to a workplace that is unendangered by employer negligence cannot be equated with a state created rights for the purpose of determining whether the employee must use RLA generated grievance procedures as his exclusive avenue for relief.[1] (App 5a-7a). Santa Fe has consistently cited such decisions as *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972), *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983), *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir., 1978) and *Landfried v. Terminal Railroad Association*, 721 F.2d 254 (8th Cir. 1983, cert. denied, ____ U.S. ____, 104 S.Ct. 1712, 80 L.Ed.2d 185 (1984) for the proposition that if a controversy can be deemed a "minor dispute" under the RLA, an employee cannot assert any FELA claim he may have that arose out of the controversy. However, all of those decisions, as well as the others cited by the District Court (App 11a-14a) and the Ninth Circuit (App 5a-6a) do not involve FELA causes of action asserting injury suffered by an employee *in his or her workplace* due to an employer's negligence. Instead, these decisions have involved state causes of action such as intentional infliction of emotional distress *outside* the workplace and wrongful termination of employment.

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[1] Intentional acts of an employer or its agent that endanger an employee are equated with negligent acts for FELA purposes. (*Jamison v. Encarnacion*, 281 U.S. 635, 641, 50 S. Ct. 440, 442, 74 L.Ed. 1082 (1932))

In Santa Fe's petition, the same litany of decisions is cited again. This time Santa Fe stresses that Buell and his supervisor argued about, among other things, events occurring in the workplace. Therefore, according to Santa Fe, any common law assaults and (perhaps) batteries that occurred in the workplace after such disputes arose are exclusively in the domain of the National Railroad Adjustment Boards ("NRAB") which have jurisdiction of disputes subject to grievance proceedings under a collective bargaining agreement. Such a proposition would render the FELA a dead letter, since controversies over working conditions such as safety of the worksite often arise in connection with injuries to employees.[2] To hold that a collective bargaining agreement provision for grievance proceedings for work condition disputes could oust FELA jurisdiction, would directly flout the intent of Congress expressed in 45 U.S.C. section 55 (declaring any contractual waivers of FELA rights to be null and void). Thus, as long as employer negligence has in whole or in part caused an injury suffered by a railroad employee, that employee has a right to sue in federal or state court under the FELA.

The decision of the Ninth Circuit accords with the firmly and repeatedly announced policy of this Court that rights granted by Congress to individual workers cannot be compromised by general provisions contained in labor-management contracts drafted within the framework of a general federal labor relations statute. (See *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 739-41, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1973)).

Finally, it is clear that no institutional purpose would be served by requiring tort claims to be sent through grievance procedures to NRAB arbitrators. While such arbitrators may have great expertise in the details of running railroads, they have no expertise on such issue as causation of damage, fixing damage amounts,

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[2] Worksite safety clearly can involve the issue of sadistic and threatening supervisors. See Lancaster v. Norfolk and Western Railway, 773 F.2d 807 (7th Cir. 1985).



weighing psychiatric testimony, etc. Such matters are properly the grist of the trial courts, state and federal. Thus there is good institutional sense in the Ninth Circuit's decision on this issue. The awkwardness of tendering basic FELA tort litigation to labor arbitrators has been noted in *Lancaster v. Norfolk and Western Railway, supra at 813*, and in *Yawn v. Southern Railway Co.*, 591 F.2d 312, 317 (5th Cir. 1979).

The *only* published circuit court decisions addressing this issue have resolved it in exactly the same manner as did the Ninth Circuit. (*Yawn v. Southern Railway Co., supra*, and *Lancaster v. Norfolk and Western Railway Company, supra* at 812-817—both decisions are discussed more fully, infra.) Both *Yawn* and *Lancaster* are either uncited or undiscussed by Santa Fe, and yet both are directly on the point at issue and hold that if a railroad employee has an FELA cause of action he is entitled to his day in court regardless of whether the claim is connected with a controversy that might be deemed a "minor dispute" under the RLA. Thus, there is no conflict between the circuit courts on this issue.

**2. Psychiatric injury such as that alleged by Buell is compensable under the FELA.**

The cause of action asserted by Buell is expressed in the most unconstrained and expansive statutory language at the disposal of Congress. The pertinent portion of 45 U.S.C. section 51 provides for recovery by ". . . any person suffering injury . . . for such injury . . . resulting . . . from the negligence of any of the officers, agents or employees of [a railroad] . . .". Certainly no limitation on the type of injury that should be considered compensable is indicated. Thus, the proper approach to the question of compensation for psychiatric injury is dictated by this Court's unequivocal statements in *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), and the language from *Urie* quoted by the Ninth Circuit is dispositive of the issue. (App. 3a-4a) As there noted, the language of the section, the humanitarian aim of Congress and the manifest intent to make an employee's FELA rights as broad as the developing common law of torts can afford all mandate a court to consider any injury that is compensable under tort law at the time of suit to be compensable under section 51.

*Urie* is also extremely informative by way of anology. At the time *Urie* was decided, society's knowledge of the causes and effects of occupational diseases was quite primitive by today's standards. However, in *Urie*, this Court, recognizing the expansive nature of section 51, held that because occupational torts were becoming recognized under developing tort law as compensable injuries, section 51 should afford injured railroad workers recovery for such harms. (See 337 U.S. at 182-187) In so holding, this Court reaffirmed that the FELA "is not to be narrowed by refined reasoning" (337 U.S. at 182, quoting *Jamison v. Encarnacion, supra* at 640) and announced that the proper spirit for the administration and application of the statute "is one not in conformity with importing nice distinctions in applying the Act's broad and general terms or cutting down their full scope by inference or implication." (337 U.S. at 186) Today, the knowledge and experience of state and federal courts concerning psychiatric injury is much greater than the expertise possessed by their predecessors regarding occupational diseases in the 1940's. Thus, if this Court in *Urie* considered occupational disease injury compensable under FELA, *a fortiori* the Ninth Circuit decision in this matter is correct.

All reported decisions have held as the Ninth Circuit did in this litigation—psychiatric injury is compensable under the FELA. Once again, Santa Fe strangely fails to call this Court's attention to the inconvenient but directly relevant authorities: *McMillan v. Western Pacific Railroad*, 54 C.2d 841, 9 Cal. Rptr. 361, 357 P.2d 449 (1960)—relying heavily upon *Urie*, the court held that a railroad worker suffering a nervous collapse from overwork at a severely stressful position was entitled to recovery under section 51, and *Yawn v. Southern Railway Company*, supra at 317—clear indication in dicta that, under *Urie*, railroad employees suffering nervous injury due to overwork may obtain section 51 recovery. Also relevant is *Lancaster v. Norfolk and Western Ry. Co., supra* at 813, 815—holding, without reliance upon *Urie*, that psychiatric injury caused by any of the traditional common law torts, including asault, is compensable under section 51.

While failing to call this Court's attention to *McMillan* and *Yawn*, Santa Fe mentions *Lancaster* in a somewhat misleading



manner and notes two recent unpublished circuit court decisions. (Petition, pages 12-14) As to the two unpublished decisions, neither conflicts with the Ninth Circuit's decision below, nor with *Yawn* or the holding of *Lancaster*. The first unpublished decision, *Antalek v. Norfolk and Western Railway Company* (6th Cir 1984) (See App 22a-24a) does *not* involve a FELA cause of action as the court states that the actions of the railroad supervisors constituted a "conspiracy to terminate Antalek's employment" (App 22a-23a). Such a conspiracy has nothing to do with creating an unsafe workplace for a railroad employee. The second decision, *Adkins v. Chesapeake and Ohio Railway Company* (4th Cir. 1985) (See App 16a-21a) was a mere per curiam decision adopting the unpublished opinion of the District Court. The latter relied upon: (1) *Antalek*, see *supra*, which did not involve a true FELA cause of action, (2) an unpublished non-FELA case, *Scales v. National Railroad Passenger Corp.*, which involved alleged supervisor harassment away from the worksite in bringing "baseless disciplinary proceedings", and (3) the now overruled decision by the District Court in this litigation.

The only published circuit court decision that possibly conflicts with the Ninth Circuit decision below is *Lancaster*, and Santa Fe seeks to so portray the decision at pages 13 and 14 of its petition. However, *Lancaster* is quite explicit in stating its holding that the plaintiff railroad worker therein *is* entitled to compensation for psychiatric injury (in the amount of $850,000) caused by the common law torts of assault and battery.

The court in Lancaster also clearly holds that purely psychiatric injury is compensable under section 51 if caused by the common law tort of assault. (See 773 F.2d at 815) A common law assault consists of either an act or words of immediate physical threat that excite an apprehension of a battery in the plaintiff. PROSSER & KEETON ON TORTS (5th ed. 1984), pages 43-46. In the case at bar, Buell has, in the words of the Ninth Circuit, alleged that his psychiatric injury was caused by the "threats, harassment and intimidation" of his supervisor. This language is only consistent with the allegation of the common law tort of assault. If Santa Fe has a complaint about the language used by the Ninth Circuit in this regard, it is entirely a product of the Santa Fe decision to

frame its motion to dismiss in the District Court solely in terms of a question of law (the "preclusive" legal effect of the RLA) without regard to the nature, cause or effect of the injury sustained by the plaintiff. (See App 26a.)

There is no substantial conflict between the Ninth Circuit's resolution of this issue and the published decisions of any other circuit court. Much less can it be seriously argued that the required "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" exists, and that is the standard this Court has established for granting a writ of certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712 (1923).

## CONCLUSION

For the reasons set out above, respondent requests that this Court deny the petition for certiorari heretofore filed by Santa Fe, thereby allowing respondent his day in court under the terms of the FELA.

Respectfully submitted,

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*Attorneys for Respondent*

*COUNSEL OF RECORD

## APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

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No. 84-2288

JIM BUELL,
*Plaintiff-Appellant,*

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
a corporation,
*Defendant-Appellee.*

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Argued and Submitted April 9, 1985

Decided Sept. 19, 1985

Joseph J. Weninger, James R. McCall, Crow, Lytle, Gilwee, Donoghue, Adler & Weninger, Sacramento, Cal., for plaintiff-appellant.

John H. Ernster, Thomas D. Peterson-More, Atchison, Topeka & Santa Fe Railway Co., Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of California

Before SCHROEDER, NELSON, and REINHARDT, Circuit Judges.

SCHROEDER, Circuit Judge.

Jim Buell appeals from the district court's grant of summary judgment in favor of the Atchison, Topeka and

Santa Fe Railway Company. The issue, one of first impression in this circuit, is whether a Railroad employee's wholly mental injury stemming from his railroad employment is compensable under the Federal Employer's Liability Act (FELA or the Act), 45 U.S.C. §§ 51-60 (1982).

Buell, a carman at the Railroad's Stockton Yard, was a member of the Brotherhood of Railway Carmen (the Union) and covered by a collective bargaining agreement between the Union and the Railroad. In October 1981, Buell had an emotional breakdown and was admitted to a hospital where he was diagnosed as suffering from major depression and a passive-aggressive personality disorder. He remained hospitalized for seventeen days and could not return to work until October 1982.

Buell alleges that his emotional breakdown was caused by the harassment, threats, and intimidation he suffered while employed at the Railroad. The primary source of this friction, he asserts, was his immediate supervisor, but he also alleges that fellow employees harassed, threatened, and intimidated him. The gravaman of Buell's complaint is that he was injured because his supervisor and co-workers intentionally and negligently harassed and abused him, and that the Railroad negligently failed to stop this harassment and abuse even after Buell and other workers complained about these actions to appropriate Railroad officials.

Section 1 of the FELA, 45 U.S.C. § 51, provides that "[e]very common carrier by railroad . . . shall be liable in damages to [employees] . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ." The FELA is a departure from the fellow servant rule and other limitations of the common law and seeks to adjust the cost of injury equitably between the worker and the Railroad. *Sinkler v. Missouri Pacific Railroad*



*Co.*, 356 U.S. 326, 329-330, 78 S.Ct. 758, 762, 2 L.Ed.2d 799 (1958). The FELA "was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 507, 77 S.Ct. 443, 449, 1 L.Ed.2d 493 (1957) (footnote omitted), *quoted in Heater v. Chesapeake & Ohio Railway Co.*, 497 F.2d 1243, 1246 (7th Cir.), *cert. denied*, 419 U.S. 1013, 95 S.Ct. 333, 42 L.Ed. 2d 287 (1974). Thus, the FELA views the railroad "as a unitary enterprise, its economic resources obligated to bear the burden of *all injuries* befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." *Sinkler*, *supra*, 356 U.S. at 330, 78 S.Ct. at 762 (emphasis added).

In light of this intended scope, the concept of "injury" under the FELA is extremely broad; the Act encompasses all reasonably foreseeable injuries which result from a railroad's failure to exercise due care with respect to its employees. *See* 32 Am.Jur.2d *Federal Employers' Liability and Compensation Acts* § 23 (1982), at 352.

Injuries compensable under the FELA are not limited to those arising from sudden accidents. In *Urie v. Thompson*, 337 U.S. 163, 186, 69 S.Ct. 1018, 1033, 93 L.Ed. 1282 (1949), the Supreme Court concluded that to be compensable under the Act, an "injury" need not be inflicted by "external, violent or accidental" means. The Court held that silicosis, an occupational disease caused by continuous inhalation of silica dust, is an "injury" as that term is used in the FELA "when it results from the employer's negligence." *Id.* at 180, 69 S.Ct. at 1030, 93 L.Ed. 1282 (1949). The Court recognized that the Congress, in enacting the FELA, primarily focused on injuries caused by sudden accidents. *Id.* at 181, 69 S.Ct.

at 1030. But, the Court noted, such injuries "were not the only ones likely to occur." *Id.*

> On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable. The wording was not restrictive as to the employees covered; the cause of injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting.

*Id.* The Court went on to state that restrictive interpretation of the Act would conflict with the Act's purpose:

> restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court.

*Id.* at 181-82, 69 S.Ct. at 1030-31 (footnote omitted).

Relying on *Urie*, the court in *Randall v. Reading Co.*, 344 F.Supp. 879, 881-82 (M.D.Pa.1972), held the conduct of the employer or his agent giving rise to injury need not involve physical contact. In *Randall*, the jury found that the railroad negligently failed to furnish prompt medical attention to an employee who suffered a heart attack. The court denied the railroad's motion for a new trial or JNOV and noted that to recover under the FELA an employee need not suffer "bodily injury." To read such a precondition into the Act, the court stated, would "depart radically from the language of the statute itself and . . . erect what amounts to an 'impact rule' for recovery under the [FELA]." 344 F.Supp. at 882. *See also Williams v. Atlantic Coast Line Rail Co.*, 190 F.2d 744, 748 (5th Cir.1951); *Miller v. Elgin, Joliet & Eastern Ry Co.*, 177 F.2d 224 (7th Cir.1949); *Stewart v. Baltimore & O.R. Co.*, 137 F.2d 527 (2d Cir.1943). These



authorities support the conclusion that an injury compensable under the Act need not result from a physical impact.

Also relying on *Urie*, the California Supreme Court has expressly recognized that a mental injury may be compensable under the FELA. *See McMillan v. Western Pacific Railroad Co.*, 54 Cal.2d 841, 9 Cal.Rptr. 361, 357 P.2d 449 (1960). In *McMillan*, the plaintiff, a train dispatcher, alleged that his employer negligently subjected him to working conditions of unusual responsibility, stress and tension by requiring him to operate the railroad's central traffic control system. He alleged that the stressful job conditions caused him to suffer a nervous breakdown which rendered him "'sick, sore, lame and disabled.'" *Id.* at 841, 9 Cal.Rptr. at 361, 357 P.2d at 449. The California Supreme Court reversed the trial court's dismissal for failure to state a claim. The court noted that "injury" as used in the FELA "is not qualified by 'accidental' or 'bodily' or any other modifying word or words." *Id.* at 843, 9 Cal.Rptr. at 362, 357 P.2d at 450. It found the allegation in the complaint sufficient to state a FELA claim. *Id.* at 845, 9 Cal.Rptr. at 362-63, 357 P.2d at 450-51. We conclude that the complaint in this case similarly states a claim under the FELA.

The district court granted the Railroad's motion to dismiss because it believed that Buell's claim constituted a "minor dispute" within the exclusive jurisdiction of the National Railroad Adjustment Board (Adjustment Board) pursuant to the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188. *See* 45 U.S.C. § 153 First (i) (1982); *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 322-25, 92 S.Ct. 1562, 1564-65, 32 L.Ed.2d 95 (1972). It relied on a series of cases in which employees had been discharged and sought, in addition to lost wages in proceedings under the RLA, tort damages under state law for emotional injuries. *See Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Mag-*

*nuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed. 2d 323 (1978). *See also Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1000, 79 L.Ed.2d 233 (1984); *Landfried v. Terminal Railroad Association*, 721 F.2d 254 (8th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1712, 80 L.Ed.2d 185 (1984). In each of these cases, a collective bargaining agreement between the railroad and the employee's union protected the employee from wrongful discharge. These cases hold that the employee's exclusive remedy for a wrongful discharge claim which is premised on a collective bargaining agreement lies with the Adjustment Board. The Board may order reinstatement and payment of lost wages, but may not order damages for emotional injury. *See Sharkey v. Penn Central Transportation Co.*, 493 F.2d 685 (2d Cir.1974).

As we noted in *Magnuson*, if the gravaman of an employee's complaint is his wrongful discharge, "the complaint involves a minor dispute which must be arbitrated following the procedures of the R.L.A." *Magnuson*, 576 F.2d at 1369. We also noted that an employee "who believes he has a legitimate grievance will doubtless have some emotional anguish," *id.*, but "[a]rtful pleading cannot conceal the reality that the gravaman of the complaint is wrongful discharge." *Id.* We concluded that a controversy is a "minor dispute" within the exclusive jurisdiction of the Adjustment Board where "the alleged misfeasance of the Railroad employees is . . . 'arguably' governed by the collective bargaining agreement or has a 'not obviously insubstantial' relationship to the labor contract." *Id.* at 1369-70.[1] In such cases, state law remedies are generally held to be preempted by the RLA.

[1] This court recently stated that a "minor dispute" "involv[es] 'grievances over the "meaning or proper application of a particular provision" in a collective bargaining agreement. . . .'" *International Association of Machinists & Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir. 1985) (quoting *Air Line Pilots Assocation v. Texas International Airlines*, 656 F.2d 16, 20 n. 6 (2d Cir. 1981)).



The plaintiff in this case, however, is not seeking additional relief under state law for a matter cognizable under the RLA and within the exclusive jurisdiction of the Adjustment Board. Buell is suing under a federal statute, i.e., the FELA, for injuries he suffered at the workplace. His complaint does not constitute a "minor dispute" within the exclusive jurisdiction of the Board because it is neither related to the collective bargaining agreement nor arguably governed by its provisions. Adjudication of the complaint will not involve the district court in the interpretation or application of the collective bargaining agreement any more than would any other suit under the FELA. The question before us is therefore not whether a state law claim is preempted by federal law but whether there is any reason under federal law to limit a railroad employee's right to relief under the FELA for emotional injury. We conclude that there is none.

The body of law which has developed under the RLA, upon which the Railroad relies, does not bar railroad employees from asserting claims under the FELA for mental, as opposed to physical, injuries. There is no rationale for such a holding. Indeed, damages for emotional distress accompanying physical injuries are recoverable in traditional FELA actions. *See Erie R. Co. v. Collins*, 253 U.S. 77, 87, 40 S.Ct. 450, 453, 64 L.Ed. 790 (1920); *Bullard v. Central Vermont Railway, Inc.*, 565 F.2d 193, 197 (1st Cir.1977). We hold that where an employee has suffered an injury attributable to employer negligence, the injury is compensable under the FELA regardless of its characterization as mental or physical.

Buell has stated a claim within the purview of FELA, and he is entitled to proceedings on the merits.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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No. CIV. S-82-776 RAR

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JIM BUELL,

*Plaintiff*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

*Defendant.*

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ORDER

[Filed July 12, 1984]

*PROCEDURAL BACKGROUND*

In the present action, plaintiff, JIM BUELL, seeks to hold his employer, the ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY ("railroad") liable under the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51, *et seq.*, for certain personal injuries which plaintiff allegedly sustained. After completion of discovery, defendant moved for summary judgment on the ground that this Court lacked subject matter jurisdiction over the action because the action either constituted a "minor dispute" within the meaning of the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.*, or was inextricably intertwined with the grievance machinery of the RLA.

Defendant's motion came on regularly for hearing before the undersigned on April 23, 1984. Joseph Weninger, Esq., appeared as counsel for plaintiff and Thomas Peterson-More, Esq., appeared as counsel for defendant. At the conclusion of the hearing, the Court orally denied



defendant's motion but subsequently issued a written memorandum directing the parties to submit supplemental briefs. The supplemental briefs having been duly submitted and considered in conjunction with the prior memoranda and oral arguments, the Court hereby GRANTS defendant's motion for summary judgment.

*FACTUAL BACKGROUND*

The facts which give rise to this lawsuit, when stated in a light most favorable to plaintiff, are as follows: At all times relevant to this lawsuit, plaintiff worked as a carman at defendant's Stockton yard, was a member of the Brotherhood of Railway Carmen ("union"), and was covered by a collective bargaining agreement between the union and the railroad.

On October 13, 1981, plaintiff was admitted to St. Joseph's Hospital in Stockton, California where he was diagnosed as suffering from major depression, a passive-aggresive personality disorder, and moderate obesity. Plaintiff was hospitalized for 17 days, and was not released to return to work until October 1, 1982.

Plaintiff believes that his mental breakdown was caused by harassment inflicted upon him at his place of employment. In particular, plaintiff alleges that the primary source of friction was plaintiff's immediate supervisor, Mr. Ed Wright. (Plaintiff's Deposition pp. 21-30). Apparently shortly after Mr. Wright began working at the Stockton yard in September, 1979, he began insisting that plaintiff and other similarly situated carmen complete certain car inspection reports in a manner which conflicted with the manner specified by Mr. Wright's supervisor, Mr. Messick. This conflict rendered it impossible for the carmen to satisfy both superiors and subjected them to constant reprimands from one supervisor or another. Another source of tension between plaintiff and Mr. Wright was the latter's practice of requiring that plaintiff help him remove company property (e.g., ice and

scrap plywood) from the yard. Plaintiff resented being required to assist with what he believed to be illegal conduct.

Apparently, plaintiff and others informally complained about Mr. Wright's conduct, but without noticeable success. Still dissatisfied, several carmen, including plaintiff, enlisted the aid of their union representatives to draft a written grievance about Mr. Wright sometime in the first part of 1981. (Plaintiff's Deposition p. 49). In response thereto, Mr. Messick's supervisor, Mr. Pichelman, convened a meeting at which the complaints about Mr. Wright's harassment, intimidation, and stealing were aired. (Plaintiff's Deposition p. 60). That the meeting did not put an end to the harassment is indicated by a letter dated June 5, 1981 from Mr. Peter Brooker, General Chairman of the Brotherhood of Railway Carmen, and sent to Mr. Pichelman. (Defendant's Memorandum of Points & Authorities, Exhibit D). This letter states that the union had received several complaints concerning Mr. Wright since the first meeting and demanded that Mr. Wright "change his tactics completely".[1]

According to plaintiff, yet another source of friction was plaintiff's co-workers themselves. One evening not long before plaintiff's mental breakdown plaintiff discovered that an unsigned cartoon drawing had been posted at several places in the yard. This drawing depicted a hippopotamus wearing overalls and a railroadman's cap and contained the caption, "carman of the month: Jim Buell". Plaintiff believes that the railroad failed to take appropriate disciplinary measures against the individual who later admitted responsibility for the drawing, Mr. Al Williams. (Plaintiff's Deposition p. 85; Ed Wright Deposition p. 54). On a different occasion, plaintiff noticed that someone had erased plaintiff's name from

[1] What further action, if any, was taken with regard to the complaints about Mr. Wright's conduct cannot be ascertained from the present record. (Plaintiff's Deposition pp. 130-135).



his time card and substituted the name "Porky." (Plaintiff's Deposition p. 87). In response, Mr. Wright verbally reprimanded the carmen as a group.

*DISCUSSION*

The issue raised by defendant's motion involves determining which of two federal statutory schemes applies to the facts as stated above. If, as plaintiff contends, these facts are encompassed by the FELA, then this Court has subject matter jurisdiction.[2] The reverse is true if these facts fall within the terms of the RLA. 45 U.S.C. § 153 First (i); *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 322 (1972); *Brotherhood of Locomotive Eng. v. Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963).

Although the narrow question of the availability to an employee covered by the RLA of a FELA remedy based on an alleged negligent failure to maintain a safe workplace is one of first impression in this circuit, there are helpful precedents concerning related statutory schemes. In *Andrews, supra*, the Supreme Court ruled that an employee who was covered by the RLA could not bring in the first instance a wrongful discharge claim where that claim was based on the collective bargaining agreement.

Five years later the Supreme Court reached a different result in the context of the National Labor Relations Act

[2] The Federal Employers Liability Act imposes civil liability on railroad carriers for injuries sustained by their employees arising from the carriers' negligence. It provides in pertinent part:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . .

45 U.S.C. § 51.

(NLRA). *Farmer v. United Broth. of C & J of Am., Local 25*, 430 U.S. 297 (1977) held that the NLRA did not preempt a state tort action for intentional infliction of emotional distress brought by a union officer on account of alleged harassment by the union. The Supreme Court recognized that the state had a substantial interest in protecting its citizens from the kind of abuse about which the plaintiff complained and reasoned that that interest outweighed the risk of interference with the federal regulatory scheme. The Court warned, however, that any claim which posed a "realistic threat of interference with the federal regulatory scheme" would not be permitted. *Id.*, at 305.

In *Magnuson v. Burlington Northern Inc.*, 576 F.2d 1367 (9th Cir. 1978) the Ninth Circuit applied the *Andrews/Farmer* analysis to a common law claim for intentional infliction of emotional distress brought by an employee covered by the RLA. Plaintiff, who had been discharged after his employer had concluded that he was responsible for a train collision, sued in state court to recover for his emotional distress allegedly caused by the railroad defendants' conspiracy to conceal their own responsibility for the collision. After the defendants removed the action to federal court, the district court dismissed for lack of subject matter jurisdiction. The Ninth Circuit affirmed, explaining:

> Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge. If the pleading of emotional injury permitted aggrieved employees to avoid the impact of the R.L.A., the congressional purpose of providing a comprehensive scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted.

*Id.*, at 1369. It also rejected plaintiff's argument that the complaint fell within the narrow exception created by *Farmer*. In contrast to *Farmer* where the wrongful



conduct was only peripherally related to federal law and affected substantial state interests, the *Magnuson* action was "based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A." *Id.* Here plaintiff's secondary complaints about defendants' abuses of the investigatory process and denial of plaintiff's right to a fair hearing were directly related to the collective bargaining agreement and therefore constituted a minor dispute within the meaning of the RLA.

The Ninth Circuit adhered to the broad view of the scope of the RLA it had taken in *Magnuson* in the recent decision of *Beers v. So. Pac. Tranp. Co.*, 703 F.2d 425 (9th Cir. 1983). In *Beers*, plaintiff was discharged for insubordination arising from his failure to apologize for an incident in which he insulted a superior. Plaintiff sought redress both by pursuing the grievance procedures afforded by the RLA and by filing an action for intentional infliction of emotional distress in state court. As was the case in *Magnuson*, the action was removed to federal court where it was dismissed for lack of subject matter jurisdiction. Again the Ninth Circuit affirmed.

The Ninth Circuit rejected plaintiff's argument that the emotional distress claim came within the *Farmers* exception because his claim was not covered by any provision of the collective bargaining agreement and the remedy sought (monetary damages) was not covered by the labor contract. It declared that the critical inquiry was whether the controversy could have been presented to the NRAB. Because this controversy could have been so presented, it was a "minor dispute" within the meaning of the RLA over which the federal court had no jurisdiction.[3]

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[3] This Court notes that the Ninth Circuit did very recently hold that a claim for wrongful termination based on public policy was not preempted by the Labor Management Relations Act (LMRA). *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 367 (9th Cir. 1984). However, in a footnote it cited *Magnuson* with approval and en-

When these precedents are applied to the instant case, it becomes apparent that plaintiff's claim falls within the purview of the RLA. Plaintiff's injury flows directly from defendant's alleged failure to take appropriate disciplinary measures with regard to alleged misconduct by plaintiff's supervisor and several of his co-workers. This type of wrongdoing, like the allegations of conspiracy to cover-up wrongdoing in *Magnuson* and the allegations of failure to conduct a full and fair investigation in *Beers*, is directly related to the employer-employee relationship. Plaintiff has never suggested that he could not have invoked the grievance procedures contained in the collective bargaining agreement to address the harassment he was suffering.[4] On the contrary, the fact that union representatives did submit a written grievance with regard to the perceived harassment by Mr. Wright indicates that the grievance procedures did apply to this type of dispute.

Plaintiff's argument that the relief sought here differs from that available under the collective bargaining agreement and the RLA misses its mark. *Magnuson* and *Beers* teach us that the Court must focus on the *source* of the injury rather than on the type of desired relief. Because the injury here had its genesis in a labor problem which constitutes a minor dispute within the meaning of the RLA, this Court is without jurisdiction to entertain plaintiff's claim.

That plaintiffs' injuries are substantial and that the passage of time might bar other avenues of relief are realities of which this Court is painfully aware. How-

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dorsed the reasoning of the Seventh Circuit in *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (91983) *cert. denied*, —— U.S. ——, 104 S.Ct. 1000 (1984). *Jackson* recognized that the case for preemption was stronger in the context of the RLA than other federal labor laws. *Garibaldi*, at 1371 n.6. *Garibaldi* also cited *Beers* with approval. *Id.* at 1373, n.8.

[4] Rule 39 of the collective bargaining agreement provides detailed procedures for processing grievances.



ever, to rule in plaintiff's favor would contravene the clear teaching of *Magnuson* that courts must prevent artful litigants from thwarting the congressional purpose of providing a comprehensive scheme for the settlement of employer-employee disputes in the railroad industry without resort to the courts. Defendant's motion for summary judgment is therefore GRANTED.

The Clerk of the Court is hereby directed to enter judgment for defendant accordingly.

IT IS SO ORDERED.

DATED: July 12, 1984.

/s/ Raul A. Ramirez
RAUL A. RAMIREZ
United States District Court
Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 85-1204

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GLEN ADKINS,

*Appellant,*

versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a foreign corporation and W. T. BRADY,

*Appellees.*

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Appeal from the United States District Court for the
Southern District of West Virginia,
at Huntington
Robert J. Staker, District Judge
(C/A 83-3488)

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Argued: July 15, 1985 Decided: October 3, 1985

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Before RUSSELL, SPROUSE and WILKINSON, Circuit Judges.

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Paul Perfater (Stephen P. Meyer; Meyer & Perfater on brief) for Appellant; Barbara Lee Ayres (William C. Beatty; Huddleston, Bolen, Beatty, Porter & Copen on brief) for Appellees.

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PER CURIAM:

In this civil action, appellant Glen Adkins seeks to recover from appellees Chesapeake and Ohio Railway Company and W. T. Brady damages for intentional infliction of emotional distress for injuries and distress suffered by appellant while in the employ of the railroad and while under the supervision of Mr. Brady. After a review of the record, consideration of the briefs, and following oral argument, we find that the district court properly held that appellant's claim arises under the exclusive jurisdiction of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1983), and is one that is subject exclusively to the administrative process of the Railway Labor Act. Accordingly, we affirm on the opinion of the district court. *Adkins v. Chesapeake and Ohio Railway Co.*, C/A No. 83-3488 (S.D.W.Va. Feb. 11, 1985).

*AFFIRMED.*

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

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Civil Action No. 83-3488

---

GLEN ADKINS,

*Plaintiff*,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a foreign corporation, and W. T. BRADY,
*Defendants.*

---

MEMORANDUM OPINION AND ORDER

[Entered February 11, 1985]

Plaintiff Glen Adkins is an employee of defendant Chesapeake and Ohio Railway Company (C&O) who seeks to recover damages for mental distress and a spastic colon allegedly caused by the harassment of his supervisor at work, defendant W. G. Brady, whose conduct the plaintiff further alleges was known or should have been known to C&O. Plaintiff brought an action in the Circuit Court of Logan County, West Virginia, against C&O and Brady pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51. Plaintiff alleges that C&O violated the FELA by failing to provide him a safe place to work. Defendants removed the action to this court invoking jurisdiction under the Railway Labor Act (RLA), 45 U.S.C. § 151.

Plaintiff has moved to remand the action to state court on grounds that removal of a FELA action is precluded by 28 U.S.C. § 1445(a) which provides: "A civil action in any State court against a railroad or its receivers or



trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States." Defendants, on the other hand, contend that this action arises under the RLA and not the FELA and that plaintiff's exclusive remedy under the RLA is the grievance and arbitration process. Plaintiff has filed a grievance which remains in arbitration. Defendants move for summary judgment on these grounds. The court denies plaintiff's motion to remand and grants summary judgment in favor of defendants.

Defendants have supplied the court and opposing counsel copies of three recent decisions all of which hold that claims like those sought to be asserted by the plaintiff herein do not arise under the FELA but are within the exclusive province of the RLA. In *Antalek v. Norfolk & Western Ry. Co.*, No. 82-427 (N.D. Ohio December 28, 1983), *affirmed*, No. 84-3057 (6th Cir. Aug. 30, 1984) (unpublished order) plaintiff brought suit under the FELA alleging that harassment by railway foremen and supervisors had caused him mental anguish, emotional distress and physical injuries requiring hospitalization. The railway moved to dismiss the complaint on grounds that plaintiff's claim was for wrongful discharge and within the exclusive jurisdiction of the RLA. The court held that the gravamen of the plaintiff's complaint, the tort of intentional infliction of emotional harm, was not actionable under the FELA and accordingly dismissed plaintiff's FELA claim.

In *Scales v. National Railroad Passenger Corp.*, No. 84-0540 (E.D. Pa. April 23, 1984), plaintiff brought suit under the FELA in state court against the railroad and his former supervisor alleging intentional and negligent infliction of emotional distress caused by harassment in connection with baseless disciplinary proceedings. Defendants removed the action to federal court asserting original jurisdiction under the RLA. Plaintiff moved to

remand to state court. The court denied the motion to remand ruling that plaintiff's claims of harassment were within the exclusive province of the RLA.

And in *Buell v. Atchison, Topeka and Santa Fe Ry. Co.*, No. S-82-776 RAR (E.D. Calif. July 12, 1984), plaintiff sought damages under the FELA for a mental breakdown which he alleged to be caused by his supervisor and co-employees. Plaintiff sought to hold the railway liable for its alleged failure to take appropriate disciplinary measures against his antagonists. The railway moved for summary judgment. The court ruled that the wrongdoing alleged by plaintiff related directly to the employer-employee relationship. Because the injury had its genesis in a labor problem which constitutes a minor dispute within the meaning of the RLA, the court granted defendant's motion for summary judgment.

In light of this precedent, the court holds that plaintiff's claims for mental distress and colitis arising from the alleged harassment by his supervisor are directly related to the employer-employee relationship and are within the exclusive province of the RLA. *See also Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978). Accordingly, plaintiff's exclusive remedy lies within the administrative process of the RLA. *See Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972).

For the foregoing reasons, it is hereby ORDERED that the motion of the plaintiff to remand this action to the Circuit Court of Logan County, West Virginia, be, and the same hereby is, DENIED and OVERRULED. It is further ORDERED that the motion of the defendants for summary judgment be, and the same hereby is, SUSTAINED.



The clerk of the court is directed to mail a certified copy of this order to all counsel of record.

ENTER:

/s/ Robert J. Staker
ROBERT J. STAKER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

No. 84-3057

---

ROBERT A. ANTALEK; MARY ANTALEK,
*Plaintiffs-Appellants,*

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
*Defendant-Appellee.*

---

[Filed August 30, 1984]

---

ORDER

BEFORE: KENNEDY, Circuit Judge; PHILLIPS, Senior Circuit Judge; and WOODS, District Judge *

This matter is before the Court upon plaintiffs' appeal from the district court's order dismissing the complaint. On July 15, 1982 plaintiffs filed a complaint alleging that this action for intentional infliction of emotional distress arises under the Federal Employee's Liability Act, 45 U.S.C. § 51 *set seq.* (FELA). Specifically, the complaint alleges that various supervisors, with the knowledge of railroad management, engaged in a course of harassment, intimidation and conspiracy to terminate Antalek's em-

* The Honorable George Woods, United States District Judge for the Eastern District of Michigan, sitting by designation.



ployment. Mrs. Antalek alleges loss of consortium. Plaintiffs are seeking monetary damages. The defendant filed a motion to dismiss arguing that Antalek's claims are subject to the exclusive jurisdiction of the National Railroad Adjustment Board (NRAB) under the Railway Labor Act (RLA), 45 U.S.C. § 153. Plaintiffs subsequently filed a motion to amend the complaint. Defendant opposed the motion. By order dated December 28, 1983 the district court granted the motion to dismiss acknowledging that Antalek's claim was subject to the exclusive jurisdiction of the NRAB and holding that the claim was not actionable under the FELA.

Defendant has requested that this Court take judicial notice of Antalek's petition before the Public Law Board (PLB) and the complaint filed in state court against W.A. Froelich, M.D.

Initially the Court notes that it takes judicial notice of the aforementioned documents pursuant to Rule 201 (d) and (f), Federal Rules of Evidence. This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After an examination of the briefs and record, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Upon careful consideration, this Court concludes that Antalek's claim for intentional infliction of emotional distress is a "minor dispute" within the purview of the RLA and, therefore, exclusive jurisdiction lies in the hands of the NRAB. *Andrews v. Louisville & Nashville Railroad*, 406 U.S. 320 (1972); *McKinney v. International Association of Machinists*, 624 F.2d 745 (6th Cir. 1980). Antalek's claims alleging intentional infliction of emotional distress, are "inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A." *Magnuson v. Burlington Northern Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Beers v. Southern Pacific Trans-*

*portation Co.*, 703 F.2d 425 (9th Cir. 1983); *Choate v. Louisville & Nashville Railroad Company*, 715 F.2d 369 (7th Cir. 1983). Moreover, Antalek can not simultaneously maintain a suit in the federal courts and before the PLB. *Minehart v. Louisville & Nashville Railroad Co.*, 731 F.2d 342 (6th Cir. 1984).

This Court further concludes that the district court correctly determined that the tort of intentional infliction of emotional distress is not actionable under the FELA. The basis of Antalek's complaint is the alleged intentional acts of harassment by defendant which ultimately caused emotional harm. This tort is not contemplated by the line of cases which allow recovery under the FELA for an intentional tort which inflicts bodily injury. *Jamison v. Encarnacion*, 281 U.S. 635 (1930); *Harrison v. Missouri Pacific Railroad*, 372 U.S. 248 (1963) (per curiam); *Brooks v. Washington Terminal Co.*, 593 F.2d 1285 (D.C. Cir.), *cert. denied*, 442 U.S. 910 (1979).

Accordingly, it is ORDERED that the district court's order be, and is hereby, affirmed. It is further ORDERED that the motion requesting the Court to take judicial notice of certain documents be, and is hereby, granted.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk



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United States District Court
Eastern District of California

No. Civ S 82 776 RAR
Date: April 23, 1984
Time: 9:00 a.m.
Ctrm: 4

Jim Buell,
Plaintiff,

vs.

The Atchison, Topeka and Santa Fe Railway Company,
Defendant.

[Filed March 19, 1984]

Notice of Motions and
Motions to Dismiss and for Summary Judgment;
Memorandum of Points and Authorities

To Plaintiff, Jim B. Buell, and to his attorney of record herein Joseph J. Weninger, and to all interested parties:

Please Take Notice that on April 23, 1984, at 9:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Raul A. Ramirez in Courtroom No. 4 of the above-entitled Court, located at 650 Capitol Mall, Sacramento, California, defendant, The Atchison, Topeka and Santa Fe Railway Company (hereinafter "Santa Fe"), will move the Court to dismiss plaintiff's Complaint for entry of summary judgment in its favor. Said Motions will be based on the grounds each and all:

1. That plaintiff's Complaint involves a "minor labor dispute" squarely within the meaning of the Railway Labaor Act [45

U.S.C. § 151 et seq.] or, alternatively, that plaintiff's Complaint involves a matrix of facts inextricably intertwined with the grievance machinery of the collective bargaining agreement and the Railway Labor Act;

2. That the exclusive jurisdiction for the resolution of such "minor disputes" is vested in a National Railway Adjustment Board (or other public law board convened pursuant to the RLA) (hereinafter collectively referred to as "NRAB");

3. That plaintiff has failed to exhaust the exclusive administrative remedies available to him under the RLA;

4. That plaintiff may not avoid the preclusive, exclusive, jurisdiction of the NRAB by pleading under the Federal Employers' Liability Act [45 U.S.C. § 51] (hereinafter "FELA"), or any other state or federal tort rubric;

5. That the above-entitled Court is without subject matter jurisdiction to hear plaintiff's claims.

Said Motions will further be based upon the pleadings, records and documents on file herein, and upon such further evidence and argument as may be presented by counsel upon hearing of said motions.

DATED: March 19, 1984

JOHN H. ERNSTER
THOMAS D. PETERSON-MORE

By /s/ THOMAS D. PETERSON-MORE
Thomas D. Peterson-More

*Attorneys for Defendant,*
*The Atchison, Topeka and*
*Santa Fe Railway Company*

# REPLY

# BRIEF

Supreme Court, U.S.
FILED
FEB 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1140

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

---

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Petitioner,*

v.

JIM BUELL,
*Respondent.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITIONER'S REPLY BRIEF

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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No. 85-1140

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Petitioner,*

v.

JIM BUELL,
*Respondent.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## PETITIONER'S REPLY BRIEF

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Respondent's argument that this case does not warrant review is necessarily bottomed on his erroneous premise that there is no true conflict among the circuits because "all reported decisions have held as the Ninth Circuit did in this litigation—psychiatric injury is compensable under the FELA." [1]

Respondent's argument, however, misstates the conflict raised by the petition in this case. The conflict among the circuits is not over whether psychiatric injury is compensable under the FELA. The conflict concerns the comparative scope of the RLA and the FELA. Specifically, the issue is whether classic workplace disputes arising out of disagreements between employee and supervisor and involving no physical contact or injury (or threat of either) can be converted from workplace disputes, subject to the exclusive grievance provisions of the RLA, into lawsuits, by the simple device of pleading psychi-

---

[1] Respondent's Brief in Opposition (Br. in Opp.) p. 8.

atric injury. Respondent does not deny, and could not deny, that if the RLA can be avoided in this case by the pleadings he has made, then every workplace dispute arising anywhere in the nation's railroad or airline work forces can be similarly removed from what Congress thought was a mandatory and exclusive non-judicial remedy for disagreements that occur in the shop.[2] Even without a conflict, such a startling holding by a circuit which embraces more railroad and airline employees than any other would clearly warrant review. Given the conflict, review is imperative.

1. It is beyond dispute that this case on these facts would have been decided differently if litigated in the Fourth, Sixth, or Seventh circuits. Either the Fourth Circuit or the Sixth Circuit would have disposed of Mr. Buell's case by summary, unpublished opinion, because in the view of both those courts the law is so well settled that nothing more than summary disposition is warranted. Respondent's assertion that *Adkins* (Pet. App. 16a *et seq.*, 4th Cir. 1985) and *Antalek* (Pet. App. 22a *et seq.*, 6th Cir. 1984) are distinguishable because they did "*not* involve a FELA cause of action . . ."[3] is simply wrong. The opinions in both cases are reproduced in the Appendix to the Petition for Certiorari. Both state unequivocally that the plaintiff brought suit under the FELA.[4]

*Adkins* and *Antalek* are indistinguishable from this case. Not even respondent suggests any basis for distinc-

[2] The Brief in Opposition accurately characterizes respondent's claim as consisting of his supervisor "Wright's abusive and threatening manner of supervising the workplace operation." *Id.* at 2.

[3] *Id.* at 9. (Emphasis in original.)

[4] The District Court's opinion in *Adkins*, adopted by the Fourth Circuit, stated that "Plaintiff brought an action . . . pursuant to the Federal Employers' Liability Act . . . ." (Pet. App. 18a.) The Sixth Circuit's opinion in *Antalek* states that ". . . plaintiffs filed a complaint alleging that this action for intentional infliction of emotional distress arises under the Federal Employees' Liability Act . . . ." *Id.* at 22a.



tion other than the erroneous assertion that *Adkins* and *Antalek* were not FELA suits. All three cases were FELA suits in which railroad employees alleged that harassment or other misconduct by their supervisors caused them emotional distress. In none of the three was there any allegation of physical contact, threat of physical contact, or physical injury. There was, therefore, no alleged assault, battery, or other traditional common law tort. Most significantly, for purposes of federal law governing labor relations in the railroad and airline industries, all three arise out of pristine workplace disputes. There are hundreds of thousands of such disputes every year in these two industries, and it has always been assumed that they are to be handled under the informal and less costly procedures of the RLA.[5]

But that is no longer the case in the Ninth Circuit.

In contrast to *Adkins* and *Antalek*, the facts in *Lancaster* v. *Norfolk and Western Ry. Co.*, 773 F.2d 807 (7th Cir. 1985), are not identical to this case. In *Lancaster*, there was physical contact and therefore, arguably, a battery. Nevertheless, it is clear beyond any doubt that Mr. Buell would have lost his suit if he had brought it in the Seventh Circuit. That Court stated in *Lancaster* that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact—an act such as telling a man he is fired, which is precisely the type of act for which the Railway Labor Act provides a swift and adequate remedy." *Id.* at 813.[6]

[5] *See* Brief for Association of American Railroads and National Association of Railroad Trial Counsel as Amici Curiae in Support of Petition, pp. 8-9; Brief of the Air Transport Association of America, as *Amicus Curiae* in Support of Petition for a Writ of Certiorari, pp. 5-6.

[6] The Seventh Circuit in *Lancaster* also held that "although the question of where to draw the line between the Railway Labor Act and the Federal Employer Liability Act is distinct from that of the

Respondent also contends that *Yawn* v. *Southern Ry. Co.*, 591 F.2d 312 (5th Cir. 1979) is consistent with the Ninth Circuit's decision in this case. In *Yawn*, the court held that "if an employee can establish physical injury caused by carrier negligence, he is entitled to damages under the FELA." *Id.* at 317. The Fifth Circuit's physical *injury* requirement is different from the Seventh Circuit's physical *contact* requirement. Indeed, the Seventh Circuit in *Lancaster* rejected *Yawn*, finding "its analysis unpersuasive." 773 F.2d at 183. The decision in *Yawn* is of questionable relevance here, because, as the Ninth Circuit's opinion indicates (Pet. App. 2a), the question in this case is whether a railroad employee's "wholly mental injury" is compensable under the FELA. In any event, even if *Yawn* is interpreted as supporting respondent's position, its real significance for the purposes of the instant petition would be to show that the conflict extends to the Fifth Circuit.

Since the petition for certiorari was filed, petitioner has learned of another court of appeals case, *Moody* v. *Maine Central Railroad Co.*, 1st Cir. No. 85-1960, whose facts are on all fours with *Buell*, *Adkins*, and *Antalek*. Like the other three, *Moody* is also an FELA suit by a railroad employee claiming emotional injury as a result of alleged harassment by the plaintiff's railroad supervisor. As in *Buell*, *Adkins*, and *Antalek*, there is no allegation of physical contact, threat of physical contact, or physical injury. The District Court dismissed Moody, holding that the case is subject to the exclusive grievance provisions of the RLA, Civil No. 84-0415-P (D. Me. Nov. 6, 1985). The case has been fully briefed and is awaiting oral argument before the First Circuit. The appellant Moody's brief relies principally on the Ninth Circuit's holding in *Buell*, whereas the appellee railroad relies on *Adkins*, *Antalek*, *Lancaster*, and the District Court decision in *Buell*. The appellee in *Moody* argues that the court of appeals' decision in *Buell* is wrong.

scope of preemption of state tort law by the Railway Labor Act, the two questions should be decided consistently" because "they involve the same underlying issue . . . ." 773 F.2d at 813. By contrast, as respondent repeatedly notes (Br. in Opp. pp. 3-5), the Ninth Circuit held that although a plaintiff pursuing a claim arising out of a workplace dispute under state law may be preempted by the exclusive grievance procedures of the RLA, another plaintiff pursuing an *identical* claim may avoid those grievances procedures by raising his claim under the FELA.



When the First Circuit decides *Moody*, therefore, at least six circuits will have joined the conflict over the issue in this case. Giving respondent the benefit of his assertion that *Yawn* supports his position, that conflict will involve either a four-two split in petitioner's favor (if the District Court's decision in *Moody* is affirmed) or a three-three split (if that decision is reversed). Either way, it is a conflict that can no longer be tolerated.[7]

2. Respondent's position that further review is not warranted is also based on his contention that the case involves only one federal statute, the FELA, rather than the interrelationships between the RLA and the FELA. Thus, respondent asserts that his claim can be fitted within the "unconstrained and expansive statutory language of the FELA."[8] He ignores the fact that the RLA is also cast in "unconstrained and expansive statutory language." By its terms, the RLA reaches "all disputes growing out of grievances [concerning] working conditions."[9]

[7] As discussed in the petition, the Eighth Circuit has also dealt with the issue of the RLA's scope. *Landfried* v. *Terminal R. Ass'n of St. Louis*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1712 (1984). While *Landfried*'s facts are not the same as this case, we believe, for reasons stated in the petition, that *Landfried*, like *Adkins*, *Antalek*, and *Lancaster*, supports petitioner. In any event, the Eighth Circuit is another in which the problem has arisen.

[8] Br. in Opp. p. 7.

[9] RLA Section 2, 45 U.S.C. § 151a.

Both statutes are very broad, and the fundamental issue which has given rise to the conflict concerns the accommodation of the two. It is helpful in this respect to consider railroad/airline industry disputes as falling into three basic categories:

> (1) Negligence suits not arising out of workplace grievances, *e.g.*, an employee injury caused by a faulty brake system.
>
> (2) Suits arising out of employer/employee workplace disputes, but which also involve either physical contact or threat of physical contact (and therefore constitute a traditional common law tort, assault or battery) or, at least involve physical injury.
>
> (3) Workplace disputes—disagreements between employees and supervisors—but involving no physical contact or threat of physical contact, and no physical injury.

*Urie* v. *Thompson*, 337 U.S. 165 (1949), on which respondent relies, falls in the first category.[10] *Lancaster* and *Yawn* fall in the second, and *Adkins*, *Antalek*, *Moody* and the instant case, *Buell*, fall in the third. There is no conflict concerning cases in the first category. They are clearly governed by the FELA, and because they are not workplace disputes, they fall outside the RLA. In petitioner's view, it should be equally clear that cases in the third category are governed by the exclusive provisions of the RLA. The reason is that federal statutes should not be interpreted out of existence. If this case can be removed from RLA coverage by artful pleading, any case can, and the RLA will have become a dead letter, repealed by FELA pleadings.

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[10] *Urie* v. *Thompson*, 337 U.S. 163 (1949), does not touch the conflict in this case. The question in *Urie* was whether the FELA and the Boiler Inspection Act include "injuries in the nature of occupational disease, here silicosis, or is confined exclusively to injuries inflicted by accident." 337 U.S. at 165. The case did not involve the RLA at all.



The hard cases, we submit, fall in the *Lancaster* and *Yawn* category—a category of cases this Court need not reach to resolve the issue in this case. All that the Court need do here is to correct the erroneous Ninth Circuit holding that even where there is no physical injury, no physical contact, and no threat of physical contact—nothing but a workplace dispute between an employee and his supervisor—the exclusive requirements of the RLA can be circumvented by the simple device of pleading emotional injury.

## CONCLUSION

The Court should grant the petition for writ of certiorari, resolve the conflict in the circuits, and clarify the comparative scope of the two most important statutes dealing with railroad industry labor disputes.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

No. 85-1140

Supreme Court, U.S.
FILED
FEB 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,

*Petitioner,*

v.

JIM BUELL,

*Respondent,*

---

# BRIEF FOR ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITION

---

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## QUESTION PRESENTED

Whether a railroad employee's claim for mental anguish arising out of a "minor" dispute, subject to the exclusive jurisdiction and procedures of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, may nevertheless be the basis for a negligence action under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*

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IN THE

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## BRIEF FOR ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITION

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This brief of the Association of American Railroads and the National Association of Railroad Trial Counsel is filed with the consent of the parties, the letters expressing such consent having been filed with the Clerk of the Court.

### STATEMENT OF INTEREST OF AMICI CURIAE

The Association of American Railroads is a voluntary, unincorporated, non-profit trade organization, headquartered in Washington, D.C. Its members con-

stitute the vast majority of the Nation's railroads. They operate approximately 92% of the line-haul mileage, produce approximately 97% of the freight revenues and employ approximately 94% of the railway work force in the United States, having in the aggregate some 300,000 employees subject to the provisions of the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Their interest is in preserving the integrity of the procedures mandated by that Act.

The National Association of Railroad Trial Counsel is a voluntary, unincorporated non-profit organization, headquartered in Los Angeles, California. Its membership consists of over 1,200 trial lawyers, who represent all of the significant railroads operating throughout the United States. One of its principal objectives is to furnish railroad counsel with a forum for the study of legal problems arising in the trial of railroad personal injury cases, including those filed under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, with a particular interest in the substantive law, as well as the strategy and tactics to be utilized in the trial thereof.

## SUMMARY OF ARGUMENT

The underlying facts and legal issues are adequately set forth in the petition filed herein, and will not be repeated here. Similarly, the conflict between the decision below and those of other circuits and the various district courts which have addressed the issue, is adequately discussed in the petition, so as to meet the criteria of this Court's Rule 17.1 relating to the considerations governing review on *certiorari*.

The purpose of this *amicus curiae* brief is to demonstrate additional special and important reasons in-



herent in the decision below, which, because of its impact, presents a truly important but unsettled question of federal law which should be resolved by this Court at the present time. Such immediate resolution is necessary not only to preserve the integrity of the procedures established by the Congress in the handling of grievances under the Railway Labor Act, but also to prevent a potential flood of litigation in the federal courts, particularly when there is no guidance as to the substantive law to be applied, or the method of proof thereunder.

## ARGUMENT

### I

### THE INTEGRITY OF THE PROCEDURES UNDER THE RAILWAY LABOR ACT SHOULD BE PRESERVED

Over the years, the Congress has legislated in a number of separate areas for the benefit of railroad workers. For example, in the field of safety, it has enacted the Safety Appliance Act, 45 U.S.C. § 1, *et seq.*, the Boiler Inspection Act, 45 U.S.C. § 17, *et seq.*, and the Federal Rail Safety Act, 45 U.S.C. § 421, *et seq.*. In the field of personal injury, the Congress made railroad workers subject to the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (hereinafter "FELA"), save for certain railroad employees working in maritime locations, who are compensated under the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*.[1]

[1] *See, Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1953). That Congress has been meticulous in so legislating is demonstrated by the fact that in 1928, when Congress adopted the

Among the various other statutes is that pertaining to disputes arising from all phases of railway labor relations, the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (hereinafter "RLA").

After considerable difficulty had been experienced with a previous version of the RLA, Congress in 1934 amended it to provide for an orderly procedure to insure the resolution of so-called "minor disputes". The fact that they are labeled "minor" disputes does not mean they are unimportant. Rather, they are, in the words of the statute:

> "...disputes ... growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions ..."

45 U.S.C. § 153 First (i).

That an employee's mental anguish underlying such a dispute was recognized by the Congress is implicit in its use of the term "grievances" in the Act, for that word pre-supposes some degree of mental anguish or injury:

> "Grievance. * * * A cause of uneasiness and complaint; a wrong done and suffered; that which gives ground for resistance, as arising from injustice, tyranny, etc.; injury."

*Webster's New International Dictionary* (2nd Edition 1939).

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federal Longshoremen's Act as the general workers' compensation act for the District of Columbia, it specifically excluded railroad employees from its coverage, so as to preserve their FELA remedy. Act of May 17, 1928, 45 Stat. 600, ch. 612, § 2, then codified at § 36-502 D.C. Code (1973 Ed.).



The RLA requires that any such grievance initially be presented for resolution on the railroad property, up to the level of the chief operating officer designated to handle such disputes. If the dispute is not adjusted on the property, it is then to be submitted to the applicable Division of the National Railroad Adjustment Board or to a "Public Law" Board of the National Mediation Service. 45 U.S.C. § 153 First (i) and Second.

This Court, in relatively recent years, has spoken to the wisdom and necessity of maintaining the integrity of the procedures and exclusive jurisdiction over "minor" disputes under the Act. In addressing the question as to whether a "minor" dispute could proceed outside the RLA, the Court, in *Andrews* v. *Louisville & N.R. Co.*, 406 U.S. 320 (1972), concluded:

> "Thus, the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law."

406 U.S. at 323.[2]

Previously, this Court had elaborated on the unique qualifications of those to whom Congress delegated the power to resolve such disputes:

> In § 3, Congress has established an expert body to settle "minor" grievances like petitioner's

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[2]The Court relied upon its earlier observation that arbitration of a minor dispute was not a matter of voluntary agreement, but rather a matter of compulsion under the RLA. *Walker* v. *Southern Railroad Co.*, 385 U.S. 196, 198 (1966).

> which arise from day to day in the railroad industry. The Railway Adjustment Board, composed equally of representatives of management and labor, is peculiarly familiar with the thorny problems and the whole range of grievances, that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs and practice.

*Gunther* v. *San Diego & A.R. Co.*, 382 U.S. 257, 261 (1965). Even more recently, this Court commented:

> The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. [citations] *Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts.* [Emphasis supplied].

*Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978).

The exclusivity of this remedy is highlighted by the fact that when the Congress has intended to allow an employee with a grievance subject to the procedures of the RLA to elect whether to proceed either under the Act or to avail himself of a remedy under another statute, it has done so specifically and unequivocally, as it did in the Federal Rail Safety Act.[3]

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[3]45 U.S.C. § 441 (Protection and Rights of Employees) provides:

"(c)(1) Any dispute, grievance or claim arising under this Section shall be subject to resolution in accordance with the procedures set forth in Section 3 of the Railway Labor Act (45 U.S.C. § 153)

* * * * * *

(d) Whenever an employee of a railroad is afforded protection under this Section and under any other provision of law in connection with the same allegedly unlawful act of an employee, if such employee seeks protection, he must elect either to seek relief under this Section or pursuant to such other provision of law."



Congress' intent to keep workplace disagreements out of the courts should not be defeated by mere artful allegations that an employee suffered mental anguish resulting from a grievance over working conditions. To permit him to proceed under the FELA whenever he chooses to allege an "injury" (particularly when the RLA's use of the term "grievances ... growing out of ... working conditions" necessarily pre-supposes by definition some degree of mental anguish or injury), would defeat the exclusive jurisdiction and procedures created by Congress to resolve such grievances.

In short, Congress has provided an exclusive, simple and effective non-judicial means for resolving disputes arising out of day-to-day workplace grievances.[4]

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[4]If the resolution of these grievances is held not to be within the exclusive jurisidiction of the RLA, it could well destroy the effectiveness of the existing procedures for their adjudication. Under the RLA, such adjudication is ultimately subject to court review only upon the most limited grounds. *See*, 45 U.S.C. § 151 First (q). Under the decision below, the FELA "negligence" standard could be utilized to encompass everything from "negligent decision" to "negligent procedures", the grounds being limited only by the imagination of the attorney drafting the complaint. This, in turn, would provoke defensive measures by

Unless reversed, the decision below will undermine that salutary Congressional judgment, at the very least, in those nine states which constitute the Ninth Circuit.

Accordingly, it is submitted that the maintenance of the integrity and exclusive jurisdiction of the RLA over "minor" disputes constitutes an important reason for this Court to invoke its *certiorari* jurisdiction to review the decision of the court below.

## II

## THE DECISION BELOW CREATES THE POTENTIAL FOR A FLOOD OF LITIGATION IN THE COURTS

To allow day-to-day railway labor grievances to proceed under the FELA, as was done below, threatens to inundate the courts with new litigation, the potential volume of which is staggering. To assess this potential, *amici curiae* surveyed twelve (12) of the major railroads as to the number of "minor" disputes handled on a yearly basis.[5] These twelve carriers reported handling in excess of 183,800 "minor" disputes during the past year, at the level of the "...chief operating officer of the carrier designated to

adjudicators to "protect their records" by adopting proceedings and procedures on a much higher level of formality, which in turn, could choke the system and destroy the very effectiveness of the procedures structured by the Congress into the RLA.

[5]The twelve carriers surveyed were the Atchison Topeka & Santa Fe, Burlington Northern, Chessie System, Chicago & Northwestern, CONRAIL, Grand Trunk Western, Illinois Central Gulf, Norfolk & Western, Seaboard System, Southern Pacific, Southern Railway and the Union Pacific.



handle such disputes." This number does not include the countless grievances settled on their properties at lower levels of management.

These day-to-day grievances, growing out of disputes over rates of pay, rules and working conditions, are usually predicated upon a simple set of facts experienced by a single employee, or sometimes by a group of employees. However, the resolution of these grievances is usually not so simple, as they usually entail the interpretation of a railroad's labor agreement which has been negotiated nationally with one of thirteen (13) unions, and/or a local agreement with one of these unions or an agreement with yet other unions present on the property. In addition, these grievances may involve the interpretation of an operating rule, a safety rule, or one of countless other types of rules. This in turn may require additional interpretation of such rules in light of one or more existing agreements, or in light of custom and practice in the industry.

That the procedures for handling these manifold grievances[6] are presently working as intended by the Congress is demonstrated by the fact that only a small percentage require resolution by the statutory Boards. The most recent available statistics for those Boards disclose an annual disposition rate of approximately 5,500 cases (1,249 by the National Railroad Adjustment Board, and 4,395 by the "Public Law Boards").[7]

[6]Under the rationale of the decision below, even a single "time claim" could be the basis for an F.E.L.A. case by the mere allegation of mental anguish arising out of the employee's inability to pay past-due bills owing to creditors.

[7]*See*, "Forty Ninth Annual Report of the National Mediation

The comparison of the Boards' statistics with those pertaining to FELA litigation in the federal trial courts is striking. In 1983 and 1984, the federal district courts terminated 1,963 and 2,089 cases respectively.[8] This annual average of 2,000 FELA case terminations is only 36% of the 5,500 grievances terminated by the statutory Boards under the Railway Labor Act, and only one percent (1%) of the 183,800 reported grievances handled last year by the twelve (12) railroads' chief operating officers. Indeed, the 183,800 grievances handled is well in excess of the entire number of annual filings of all private civil actions in the federal courts![9]

It is submitted that the self-evident potential for a dramatic rise in litigation in the federal courts resulting from the decision below[10] demonstrates the importance and the immediacy of the question of federal law presented herein. This question should be decided by this Court at the present time, so as to prevent a flood of litigation in the trial courts.

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Board, including the Report of the National Railroad Adjustment Board for Fiscal Year Ended September 30, 1983", U.S.G.P.O. 1985 0-466-003, at pp. 44-46.

[8]*See*, "Annual Report of the Director of the Administrative Office of the United States Courts", 1983 and 1984, at Table C3B.

[9]146,039 in 1983, and 149,618 in 1984. *Ibid*, at Table C3.

[10]For example, Mr. Buell complains of insufficient discipline meted to his co-workers. Had drastic discipline been imposed so as to cause the co-workers to have mental anguish, they could sue under the FELA under the holding below.



## III

## THE DECISION BELOW CREATES, BUT FAILS TO RESOLVE QUESTIONS OF SUBSTANCE AND PROCEDURE

The decision below raises important substantive issues and problems of proof, neither of which it addresses. Such issues and problems will be presented in any case where an FELA claim is predicated upon a Railway Labor Act grievance.

For example, in a case such as the one at bar, where there are allegations concerning the quality of a foreman's instructions, or that discipline imposed upon co-workers is insufficient, the threshold question is presented as to whether the case is to proceed upon the "clearly erroneous" or "arbitrary and capricious" standard usually involved in the review of an administrative determination, or whether the issue is to be tried *de novo* before a lay jury? If the latter, by what standard is a jury to judge the discretionary exercise of such managerial prerogatives as the imposition and severity of discipline, or whether the foreman's instructions were proper, particularly since both are grounded in one or more labor agreements, company rules and/or in custom in the industry? Grievances involving discipline and obedience to rules, instructions and orders are easily processed under the RLA, by those intimately familiar with the day-to-day problems of railroading, and who have expertise in dealing with such problems. However, an entirely different situation is presented when such issues are brought before a judge or jury.

Of the many variances in the procedures utilized in the resolution of factual issues under the RLA, as

contrasted with those utilized in a court proceeding, probably the most striking example is that involved in the often-disputed question of an employee's physical ability to perform his work, which usually arises in connection with a job assignment. Under the RLA, an effective and complete resolution is obtained by the long-standing practice of a three-doctor panel (one selected by the carrier, one by the employee, and the third selected by the first two doctors), the majority vote of the panel deciding the issue.[11] In the FELA case (like any other personal injury action, after considerable discovery and expense), the jury resolves such medical issues after hearing the conflicting opinions of the physicians retained by each side. Here again, in the grievance-based FELA case, the courts will have to decide whether the decision of the three-doctor panel is binding unless "clearly erroneous" or "arbitrary and capricious"; or whether the panel's decision is admissible merely as an item of evidence; and if so, the quantum of proof necessary to overcome it.

These practical problems will be inherent in any courtroom presentation of employee grievances brought under the FELA, should such actions be allowed to proceed in the district courts. There are presently no pronouncements by this Court or by any of the courts of appeal which address either the substantive issue of the standard to be utilized in this type of case, or the method of proving such a case before a jury.

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[11]This procedure was reviewed by this Court, and held to be binding upon the courts in *Gunther* v. *San Diego & A.R. Ry. Co.*, *supra*, 382 U.S. at 261-262.



Because the decision below leaves unanswered these essential questions, a development of case law will be required to meet the widely-varying factual situations inherent in the myriad of railway employees' grievances, and thus a further demand will be visited upon the trial courts in analyzing and adjudicating the wide range of intricate legal issues involved in these cases.

The consideration of the additional time which will be required to develop and resolve these issues by the trial courts, which are already struggling under the load of heavy dockets, further underscores the importance of the decision below, so as to warrant review by this court at the present time.

## CONCLUSION

On the basis of the foregoing, *amici curiae* Association of American Railroads and National Association of Railroad Trial Counsel respectfully submit that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case should be granted.

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# AMICUS CURIAE

# BRIEF

Supreme Court, U.S.
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No. 85-1140

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

*Petitioner*

v.

JIM BUELL

*Respondent*

## BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether an employee covered by the Railway Labor Act ("RLA"), 45 U.S.C. §151, claiming mental injury resulting from alleged negligence by the employer in failing to correct the employee's working conditions, may avoid the exclusive jurisdiction and dispute resolution procedures of the RLA by bringing his claim under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51.

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NO. 85-1140

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

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THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY

Petitioner

V.

JIM BUELL

Respondent

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# BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This brief in support of the Petition for a Writ of Certiorari is filed with the consent of the parties. Letters from the parties stating their consent have been filed with the Clerk of the Court.

## STATEMENT OF INTEREST OF AMICUS CURIAE

The Air Transport Association of America ("ATA") is a trade and service association headquartered in Washington, D.C. ATA's thirty-one member airlines[1/] employ more than 300,000 persons.

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1/ The member airlines of ATA are: AirCal, Inc., Air Canada, Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Braniff, Inc., Continental Airlines Corporation, CP Air, Delta Air Lines, Inc., Eastern Air Lines, Inc., Evergreen International Airlines, Inc., Federal Express Corporation, The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Jet America Airlines, Inc., Midway Airlines, Inc., Northwest Air- lines, Inc., Ozark Air Lines, Inc., Pan American World Airways, Inc., Piedmont Airlines, PSA-Pacific Southwest Airlines, Inc., Purolator Courier Corporation, Republic Airlines, Inc., TranStar Airlines Corporation (formerly Muse Air Corporation), Trans World Airlines, Inc., United Airlines, Inc., United Parcel Service, USAir, Inc., Western Airlines, Inc., and World Airways, Inc.



Since 1936, the RLA has governed airline labor-management relations.[2/] For this reason, ATA follows closely the case law in this area. To the extent that the case at bar interprets the scope of the exclusive jurisdiction and procedures of the RLA, ATA and its members have a significant interest in the outcome of this case.

## STATEMENT OF THE CASE

ATA, as amicus curiae, is bound by the recitations of the facts included by the parties in their briefs.

## REASONS FOR GRANTING THE PETITION

The decision below substantially constricts the scope of the compre-

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2/ Ch. 166, 49 Stat. 1189 (1936).

hensive scheme of grievance and arbitration procedures crafted by Congress to resolve labor-management disputes concerning matters of interpretation or application of a collective bargaining agreement, including disputes which arise concerning employee working conditions. The court of appeals mischaracterized the dispute at issue concerning employee working conditions as a tort claim under the FELA instead of a "minor dispute" under the RLA. If allowed to stand, the decision below could lead future courts to construe in likewise manner similar claims made under state tort laws, as well as claims made under the FELA. This will cause confusion and inconsistency in this important area of labor law.



Mr. Buell's grievance -- which arises solely out of a disagreement with his supervisors concerning his working conditions and which involves no physical injury -- is the clearest kind of dispute that the airline industry considers to be governed by the exclusive requirements of the RLA. It is the type of workplace dispute which Congress designed the RLA grievance and arbitration procedures to resolve. The RLA procedures are more flexible, less costly and better adapted to the prompt resolution of basic workplace disputes than are costly and time consuming legal proceedings.

If, by the simple device of pleading emotional distress, a plaintiff may avoid the exclusive requirements of

the RLA in favor of state tort laws or, as in this case, the FELA, the function of collective bargaining agreements under the RLA will become meaningless. Few disagreements related to the application or interpretation of a collective bargaining agreement cannot be converted into personal injury suits for emotional distress under state tort laws or under the FELA. Because of the number of employees subject to the RLA in the airline and railroad industries, numerous artfully pleaded cases will follow which will seek to evade what has been, up to now, the established rule that "state law remedies are generally preempted by the RLA." Buell v. Atchison, Topeka and Santa Fe Railway Company, Pet. App. at 6a (9th



Cir. 1985).

The significance of the conflict between the decision below and decisions from other circuits is discussed fully by the petitioner and will not be discussed further herein.

The RLA provides exclusive jurisdiction over, and a comprehensive mechanism for determining, all employer-employee disputes directly or substantially related to matters governed by a collective bargaining agreement. Elgin, Joliet & Eastern Railway v. Burley, 325 U.S. 711 (1945), aff'd. on rehearing, 327 U.S. 661 (1946); International Ass'n. of Machinists v. Aloha Airlines, Inc., 776 F.2d 812, 815 (9th Cir. 1985). Such matters include not only discharge, but

also terms of employment, disciplinary procedure, and working conditions. Andrews v. Louisville and Nashville R. Co., 406 U.S. 320 (1972); Beers v. Southern Pacific Transportation Co., 703 F.2d 425 (9th Cir. 1983); Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978). In labor relations parlance, such disputes are termed "minor disputes."

Congress enacted the RLA in 1926 to provide, among other things, for the prompt and orderly resolution of minor disputes. See International Ass'n. of Machinists v. Central Airlines, Inc., 372 U.S. 682, 687 (1963). The dispute resolution machinery in the RLA is designed to accomplish this purpose by providing for adjustment boards which



arbitrate such minor disputes. 45 U.S.C. §153 First (i) (1982). For these reasons, Congress saw fit to make the RLA arbitration provisions the exclusive remedial forum for dispute resolution. Union Pacific Railroad v. Sheehan, 439 U.S. 89 (1978); Andrews v. Louisville & Nashville R. Co., supra; Magnuson v. Burlington Northern, Inc., supra.

The perception that the remedy mandated under the RLA is inadequate when compared to remedies which might otherwise be available under state law or, as in this case, under the FELA, will not justify avoiding the exclusive jurisdiction of the RLA. Andrews v. Louisville & Nashville R. Co., supra. Nor will courts permit an end run around the RLA by artful pleading.

Lancaster v. Norfolk & Western R. Co. 773 F.2d 807, 815 (7th Cir. 1985).

For example, in Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978), the Court of Appeals for the Ninth Circuit upheld the trial court's dismissal of an employee's claim alleging intentional infliction of emotional distress. Id. at 1370. The court concluded that the employee's sole remedy was to be found under the RLA:

> Every employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged. Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge. If the pleading of emotional injury permitted aggrieved employees to avoid the impact of the R.L.A., the congressional purpose of providing a comprehensive scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted.



Id. at 1369.

In the decision below, although the court of appeals correctly stated the law concerning minor disputes (Pet.App. at 6a), it incorrectly concluded as a matter of law that respondent Buell's complaint is not a minor dispute. This conclusion obtained because the court did not focus its analysis on the source and nature of the underlying dispute, but instead focused on the remedies available.

In Lancaster v. Norfolk & Western R. Co., 773 F.2d 807 (7th Cir. 1985), the court neatly fashioned the issue before it, the same issue which was

before the court below:

> Although the question of where to draw the line between the Railway Labor Act and the Federal Employers' Liability Act is distinct from that of the scope of preemption of state tort law by the Railway Labor Act, the two questions should be decided consistently. They involve the same underlying issue: whether the defendant's misconduct, although tortious, is the sort of conduct that Congress, if it had thought about the matter, would have wanted to channel through the grievance machinery set up by the Railway Labor Act, or instead the sort of conduct that Congress would have wanted to leave . . . to state or federal tort remedies.

Id., 773 F.2d at 813-14 (emphasis added).

Stated another way, the question which the court below should have addressed is whether the dispute giving rise to respondent's claim was related to a matter governed by the collective



bargaining agreement such that its resolution under the RLA satisfies the purpose and judgment of Congress in providing the RLA's grievance and arbitration procedures.

ATA agrees with the petitioner that the gravamen of respondent's allegations is that he was subjected to improper working conditions, a matter governed by provisions of the collective bargaining agreement between the parties. See Pet. App. at 2a. However, plaintiff's artful pleading under the FELA misled the court of appeals into determining whether the FELA provided a "better" remedy than that available under the RLA, an issue which was not properly before the court. Had the court below focused on the nature of respondent Buell's claim

and on the underlying facts, as the district court did (Pet. App. at 14a), it would have concluded that respondent's allegations "[are] directly related to the employer-employee relationship." Buell v. The Atchison, Topeka & Santa Fe Railway Co., Pet. App. at 14a (D.C.E.D.Cal. 1984).

## CONCLUSION

If the Court allows the decision below to stand, then at least for the Ninth Circuit whose constituent states provide the workplaces for a significant number of airline industry employees, the net result will be that any disgruntled employee may elect to repeal, for his or her particular case, the judgment of Congress to channel the resolution of minor disputes concerning



collectively bargained rights and working conditions through grievance and arbitration procedures. Even without a conflict among the circuits, such a startling result would warrant review by this Court. Given that conflict, and given the intensely interstate nature of the airline industry, review is absolutely compelled. Further, the reasoning of the court of appeals will support future claims under state tort laws and under the FELA which should be subject to the exclusive jurisdiction and procedures of the RLA. This, in turn, will create considerable confusion and inconsistency in an important area of substantive law.

The petition for a writ of certiorari to review the judgment of

the Court of Appeals for the Ninth Circuit in this case should be granted.

Respectfully submitted,

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# JOINT

# APPENDIX

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Petitioner,*

v.

JIM BUELL,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED JANUARY 6, 1986**
**CERTIORARI GRANTED MAY 5, 1986**

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| Opinion of the United States Court of Appeals for the Ninth Circuit dated September 19, 1986 | 1a |
| Opinion of the United States District Court for the Eastern District of California dated July 12, 1984 | 8a |

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

| Date | Record No. | Proceedings |
|---|---|---|
| September 2, 1982 | 1 | Complaint in Case No. CV S 82-776 RAR, U.S. District Court for the Eastern District of California filed |
| October 14, 1982 | 2 | Defendant's Answer filed |
| October 26, 1982 | 3 | Plaintiff's deposition notice: Wright |
| October 26, 1982 | 4 | Plaintiff's deposition notice: Pichelman |
| November 16, 1982 | 5 | Defendant's deposition notice: records |
| November 23, 1982 | 6 | Plaintiff's deposition notice: Pichelman |
| November 23, 1982 | 7 | Plaintiff's deposition notice: Wright |
| November 30, 1982 | 8 | Defendant's deposition notice: records |
| December 30, 1982 | 9 | Defendant's deposition notice: records |
| January 27, 1983 | 10 | Plaintiff's deposition notice: Wright |
| March 2, 1983 | 11 | Defendant's Notice of Motion to Compel |
| March 24, 1983 | 12 | Plaintiff's Answer to Defendant's Interrogatories |
| March 25, 1983 | 13 | Plaintiff's Notice of Service of Answer to Interrogatories |
| March 30, 1983 | 14 | Defendant's Amended Notice of Motion to Compel |

| Date | Record No. | Proceedings |
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| April 11, 1983 | 15 | Defendant's Notice of Rescheduled Motion to Compel Before Magistrate |
| May 9, 1983 | 16 | Deposition: E. Wright |
| May 12, 1983 | | Minutes: Defendant's Motion to Compel Granted |
| May 16, 1983 | 17 | Plaintiff's Interrogatories |
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| August 4, 1983 | 21 | Defendant's Notice of Deposition: Linden High School Records |
| August 15, 1983 | 22 | Defendant's Notice of Motion to Compel Further Answers to Interrogatories |
| August 15, 1983 | 23 | Defendant's Interrogatories |
| August 15, 1983 | 24 | Defendant's Deposition Notice: Buell |
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| August 16, 1983 | 26 | Plaintiff's Declaration J. Weninger |
| August 16, 1983 | 27 | Stipulation re: discovery disagreement (signed only by Plaintiff's counsel) |
| August 17, 1983 | 28 | Proof of Service |



| Date | Record No. | Proceedings |
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| September 1, 1983 | 31 | Stipulation and Order Continuing Discovery Motion |
| September 6, 1983 | 29 | Defendant's Deposition Notice: Johnston |
| September 6, 1983 | 30 | Defendant Substitutes Attorney |
| September 12, 1983 | 32 | Defendant's Memorandum Opposing Plaintiff's Discovery Motion |
| September 26, 1983 | 33 | Defendant's Notice Continued Deposition: Buell |
| September 26, 1983 | 34 | Defendant's Notice Continued Deposition · Johnston |
| September 28, 1983 | 35 | Plaintiff's Answer to Defendant's Second Set of Interrogatories |
| October 6, 1983 | 36 | Plaintiff's Status Report |
| October 14, 1983 | 37 | Defendant's Status Report |
| October 18, 1986 | 38 | Order of the District Court: After Status Conference Setting Procedural Dates |
| October 24, 1983 | 39 | Plaintiff's Notice Disclosing Expert Witness |
| October 24, 1983 | 40 | Plaintiff's Statement re: Local Rule 109 |
| October 31, 1983 | 41 | Defendant's Notice of Withdrawal of Discovery Motion Without Prejudice |
| March 19, 1984 | 42 | Defendant's Notice of Motion and Motion to Dismiss and for Summary Judgment |

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| March 26, 1983 | 43 | Defendant's Declaration of Service by mail |
| April 9, 1984 | 44 | Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment |
| April 11, 1984 | 45 | Deposition: Buell |
| May 1, 1984 | 46 | Order of the District Court: Counsel to Submit Additional Memoranda Concerning Motion for Summary Judgment |
| May 21, 1984 | 47 | Order of the District Court: Setting Procedural Schedule for Supplemental Memoranda |
| May 22, 1984 | 48 | Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment filed |
| June 11, 1984 | 49 | Plaintiff's Supplemental Memorandum filed |
| July 12, 1984 | 50 | Order of the District Court: Granting Defendant's Motion for Summary Judgment (Appendix to Petition for Certiorari at 8a) |
| July 13, 1984 | 51 | District Court Judgment entered |
| July 19, 1984 | 52 | Plaintiff's Notice of Appeal |
| October 24, 1984 | | Plaintiff's Opening Brief to Ninth Circuit filed |
| December 24, 1984 | | Defendant's Brief to Ninth Circuit filed |
| January 3, 1985 | | Plaintiff's Reply Brief to Ninth Circuit filed |



| Date | Record No. | Proceedings |
|---|---|---|
| April 9, 1985 | | Argued and Submitted to Ninth Circuit |
| September 19, 1985 | | Decision of United States Court of Appeals for Ninth Circuit (reported at 771 F.2d 1320) |
| October 31, 1985 | | Mandate of Ninth Circuit issued |
| January 6, 1986 | | Petition for Writ of Certiorari filed on behalf of The Atchison, Topeka and Santa Fe Railway Company |
| February 21, 1986 | | Brief in Opposition to Petition for Writ of Certiorari filed on behalf of Jim Buell |
| February 26, 1986 | | Reply to Opposition to Petition for Writ of Certiorari filed on behalf of The Atchison, Topeka and Santa Fe Railway Company |
| May 5, 1986 | | Order of Supreme Court Granting Writ of Certiorari |

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-82-776 RAR

JIM BUELL,
*Plaintiff,*

vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY, a corporation,
*Defendant.*

[Filed Sept. 2, 1982]

**COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

Plaintiff complains against defendant as follows:

*FIRST CAUSE OF ACTION*

I

Plaintiff is informed and believes and thereon alleges that at all times herein mentioned defendant THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY was, and now is, a duly formed and exist-



ing corporation doing business as a common carrier by railroad in interstate commerce in California and other states.

II

At all times mentioned and in particular, since January 1, 1980, plaintiff was employed by defendant in such interstate commerce working as a carman in the Stockton Yard of defendant in San Joaquin County, California, within the Eastern District of California, at which time and place both plaintiff and defendant were engaged in the conduct of interstate commerce.

III

This action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C. 51, *et seq.*

IV

At said time and place, defendant, through its officers, agents, or employees, conducted the railroad business negligently and unlawfully and failed to provide plaintiff with a safe place to work, including, but not limited to, having fellow employees harass, threaten, intimidate plaintiff, and in particular, foreman ED WRIGHT threatened, harassed, and intimidated plaintiff maliciously and oppressively, negligently, and intentionally, in order to cause personal injury to plaintiff and to cause mental and emotional suffering. All said acts were condoned and approved by defendant THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY and as a direct and proximate result of said negligence and intentional acts, plaintiff was caused to suffer an emotional breakdown, thus inflicting on plaintiff injuries and damages as hereinafter alleged.

V

As a further direct and proximate result thereof, plaintiff has been caused to suffer severe personal in-

juries, severe mental and emotional injuries, has incurred past and prospective medical and allied expenses, and has suffered past and prospective impairment of earning capacity, the nature and extent of all of which he shall prove at trial.

VI

By reason of the premises, plaintiff suffered ONE MILLION DOLLARS ($1,000,000.00) general damages.

VII

Plaintiff respectfully prays for trial of this cause by jury.

WHEREFORE, plaintiff prays for a joint and several judgment against defendant as follows:

1. For general damages in the amount of ONE MILLION DOLLARS ($1,000,000.00);

2. For medical and allied expenses and impairment of earning capacity, according to proof;

3. For costs of litigation incurred herein; and

4. For such other and further relief as the Court may deem proper.

DATED: September 1, 1982.

CROW, LYTLE, GILWEE,
DONOGHUE, ADLER & WEINGER
Attorneys for Plaintiff

By /s/ Joseph J. Weninger
JOSEPH J. WENINGER



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

---

No. CIV S 82 776 RAR

---

JIM BUELL,
*Plaintiff,*

vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY, a corporation,
*Defendant.*

---

**ANSWER TO COMPLAINT FOR DAMAGES—
DEMAND FOR JURY TRIAL**

COMES NOW THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (hereinafter "SANTA FE"), answering for itself and itself alone, and in answer to plaintiff's Complaint for Damages for Personal Injuries, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress on file herein, said defendant admits, denies and alleges as follows:

ANSWER TO FIRST CAUSE OF ACTION

1. Answering Paragraph I, this defendant admits the allegations therein contained.

2. Answering Paragraph II, this defendant does not have sufficient information or belief to enable it to answer the allegations therein contained, and basing its denial on said ground, this defendant denies each and every, all and singular, said allegations.

3. Answering Paragraph III, this defendant denies each and every, all and singular, the allegations therein contained.

4. Answering Paragraph IV, this defendant denies each and every, all and singular, the allegations therein contained.

5. Answering Paragraph V, this defendant denies each and every, all and singular, the allegations therein contained, and denies that plaintiff will or did incur any expenses whatsoever; further, Santa Fe denies that plaintiff did or will suffer any loss of earnings, future loss of earnings, or earning capacity as a result of any negligence, carelessness recklessness or unlawfulness on the part of this defendant, its agents, servants or employees.

6. Answering VI, this defendant denies each and every, all and singular, the allegations therein contained and, specifically denies that plaintiff has been damaged, generally or otherwise, in the sum of $2,000,000.00, or in any sum or sums whatsoever, by reason of any carelessness, negligence, recklessness, or unlawfulness on the part of this defendant, its agents servants or employees.

*FIRST AFFIRMATIVE DEFENSE*

As a first, separate and affirmative defense to each and all causes of action of the Complaint on file herein, defendant alleges that said Complaint and each and all causes of action thereof, fail to state facts sufficient to constitute a claim upon which relief may be granted against this defendant, arising under the Federal Employers' Liability Act [45 U.S.C. § 51 et seq.].

*SECOND AFFIRMATIVE DEFENSE*

As a second, separate and affirmative defense to each and all causes of action of the Complaint on file herein, this answering defendant ALLEGES that the Complaint and each and all causes of action thereof, fails to state facts sufficient to constitute a claim upon which relief



may be granted against this defendant in that plaintiff has failed to satisfy the prerequisites to assertion of claims arising under the FELA as contained in 45 U.S.C. Section 56.

*THIRD AFFIRMATIVE DEFENSE*

As a third, separate and affirmative defense to each and all causes of action of the Complaint on file herein, this answering defendant ALLEGES that the Complaint and each and all causes of action thereof, fails to state facts sufficient to constitute a claim upon which relief may be granted against this defendant in that assertion of plaintiff's claims is barred by the applicable statute of limitations as set forth in California Code of Civil Procedure Section 340(3).

*FOURTH AFFIRMATIVE DEFENSE*

As a fourth, separate and affirmative defense to each and all causes of action of the Complaint on file herein, this answering defendant ALLEGES that enforcement of the rights therein asserted by plaintiff is barred by the doctrine of laches.

*FIFTH AFFIRMATIVE DEFENSE*

As a fifth separate and affirmative defense to each and all causes of action of the Complaint on file herein, this answering defendant ALLEGES that said Complaint and each and all causes of action thereof, fail to state claims upon which relief may be granted in this Court against this defendant in that plaintiff's exclusive remedies for disputes arising in connection with the terms and working conditions of railway employment are before the Railway Labor Adjustment Board.

*SIXTH AFFIRMATIVE DEFENSE*

As a sixth, separate and affirmative defense to each and all causes of action of the Complaint on file herein,

this answering defendant ALLEGES that said Complaint and each and all causes of action thereof, fail to state claims upon which relief may be granted in this Court against this defendant in that plaintiff has failed to exhaust the exclusive administrative remedies available to him before the Railway Labor Adjustment Board for disputes arising in connection with the terms and working conditions of railway employees.

*SEVENTH AFFIRMATIVE DEFENSE*

As a seventh, separate and affirmative defense to each and all causes of action of the Complaint on file herein, this answering defendant ALLEGES that said Complaint and each and all causes of action thereof, fail to state claims upon which relief may be granted in this Court against this defendant in that the Court is without judicial jurisdiction to grant relief for disputes arising in connection with the terms and working conditions of railway employees.

*EIGHTH AFFIRMATIVE DEFENSE*

As an eighth, separate and affirmative defense to each and all causes of action of the Complaint on file herein, this answering defendant ALLEGES that plaintiff has failed to mitigate his damages, if any.

*NINTH AFFIRMATIVE DEFENSE*

As a ninth, separate and affirmative defense to each and all causes of action of the Complaint on file herein, this answering defendant ALLEGES that if plaintiff incurred or sustained any injuries, loss or damages as the result of matters described in said Complaint, said injuries, loss or damages, if any, were solely and proximately caused by the carelessness, negligence and conduct of plaintiff in failing to exercise ordinary care, or any care whatsoever, for his own safety, protection and well-being at the times and places mentioned in said Com-



plaint, and not as the result of any unlawful conduct on the part of this defendant.

*TENTH AFFIRMATIVE DEFENSE*

As a tenth, separate and affirmative defense to each and all causes of action of the Complaint on file herein, this answering defendant ALLEGES that if plaintiff incurred or sustained any injuries, loss or damages as the result of the matters described in said Complaint, said injuries, loss or damages, if any, were proximately caused and contributed to by the carelessness, negligence and conduct of plaintiff, in that he failed to exercise ordinary care, or any care whatsoever, for his own safety, protection, and well-being at the times and places mentioned in said Complaint, and not as the result of any unlawful conduct on the part of this defendant.

WHEREFORE, this answering defendant, SANTA FE, prays that plaintiff takes nothing by reason of his Complaint on file herein, and that this defendant be awarded its costs of suit and such other relief as this Court deems proper.

DATED: October 11, 1982.

THOMAS I. MCKNEW, JR.
THOMAS D. PETERSON-MORE

By /s/ Thomas D. Peterson-More
THOMAS D. PETERSON-MORE

Attorneys for Defendant,
THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY

## DEMAND FOR JURY TRIAL

Defendant herewith demands that the above-entitled cause be tried by jury of the general venire.

DATED: October 11, 1982

THOMAS I. MCKNEW, JR.
THOMAS D. PETERSON-MORE

By /s/ Thomas D. Peterson-More
THOMAS D. PETERSON-MORE

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THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY

# PETITIONER'S

# BRIEF

(9)

Supreme Court, U.S.
FILED
JUL 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1140

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

*Petitioner,*

v.

JIM BUELL,

*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR PETITIONER

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July 18, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

4212

## QUESTION PRESENTED

Whether the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, should be interpreted so as to minimize the likelihood of conflict between their provisions, and more specifically, whether a claim is actionable under the FELA, where the alleged source of such injuries was a workplace dispute subject to mandatory grievance procedures which had been initiated pursuant to the RLA?

## LIST OF PARTIES

The caption of the case contains the names of all parties.*

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* An updated version of the statement required by Supreme Court Rule 28.1 is appended hereto as Attachment A.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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No. 85-1140

---

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

*Petitioner,*

v.

JIM BUELL,

*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR PETITIONER

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### OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-7a) is reported at 771 F.2d 1320 (1985). The district court's opinion (Pet. App. 8a-15a), granting Petitioner's motion for summary judgment based on lack of subject matter jurisdiction, is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on September 19, 1985. On December 10, 1985, Justice

Rehnquist extended the time for filing a petition for a writ of certiorari to and including January 17, 1986. The petition for a writ of certiorari was filed on January 6, 1986, and granted on May 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Title I, Section 2 of the Railway Labor Act ("RLA"), as amended, 45 U.S.C. § 151a, provides in pertinent part:

> The purposes of the Chapter are (1) to avoid any interruption to Commerce or to the operation of any carrier engaged therein . . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Title I, Section 2 of the RLA, 45 U.S.C. § 152, also provides in pertinent part:

> *First. Duty of carriers and employees to settle disputes.* It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> *Second. Consideration of disputes by representatives.* All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.[1]

[1] The text of 45 U.S.C. § 153 First (i), setting forth the procedures applicable to resolution of grievances under the RLA, is provided in the Pet. App. at 25a.



Section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

## STATEMENT OF THE CASE

1. Petitioner, The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), is a common carrier by rail operating in the western and midwestern United States. Respondent, Jim Buell, worked as a carman in Santa Fe's rail yard in Stockton, California.

The terms and conditions of Respondent's employment were governed by a collective bargaining agreement entered into pursuant to the RLA, by Petitioner and the Brotherhood of Railway Carmen of the United States and Canada (Pet. App. 9a). Consistent with the RLA, Rule 39 of that agreement provides a detailed mechanism whereby an aggrieved employee, with or without the assistance of his union representatives, can initiate and prosecute a grievance through successive levels of appeal up to and including mutually-binding arbitration before the National Railroad Adjustment Board ("NRAB") (Pet. App. 26a-28a).

The gravamen of Respondent's claims concerns several practices alleged to have occurred shortly after his immediate supervisor, Ed Wright, began working at the Stockton yard in September, 1979. Mr. Wright allegedly insisted that Respondent and other carmen complete certain car inspection reports in a manner that conflicted

with instructions previously given by Mr. Wright's supervisor, making it impossible for carmen to satisfy both of their supervisors (Pet. App. 9a; Buell Dep. at 20-26). Also, Mr. Wright purportedly required Respondent to help him remove what Mr. Buell believed to be company property (*e.g*, ice and plywood) from the yard, a practice that Respondent resented because he thought it was illegal (Pet. App. at 9a-10a; Buell Dep. 50-59, 63-75).

Respondent further believed that Mr. Wright failed to take appropriate disciplinary measures against co-workers who allegedly harassed Respondent. Respondent complained about an unsigned cartoon drawing that had been posted at several places in the yard. This drawing depicted a hippopotamus wearing overalls and a railroad cap and contained the caption, "carman of the month: Jim Buell" (Pet. App. 10a; Buell Dep. 76-85). On a different occasion, Respondent noticed that his name had been erased from his time card and in its place the name "Porky" had been written (Pet. App. at 10a-11a; Buell Dep. at 87). Although Mr. Wright verbally reprimanded the carmen as a group following this incident (Pet. App. at 11a), Respondent considered this disciplinary action insufficient. Finally, the purported harassment allegedly included two unfulfilled threats by Mr. Wright to fire Respondent (Buell Dep. at 109-112).

Pursuant to the collective bargaining agreement's grievance procedures, Respondent and several other carmen in early 1981 enlisted the aid of their union representative to draft a written grievance about Mr. Wright (Pet. App. 10a). Subsequently, Respondent's complaints were aired at a meeting between Santa Fe and union officials (*id.*). In addition, on June 5, 1981, the union transmitted a letter to Santa Fe threatening further action under the grievance procedures unless Petitioner took what the union considered to be appropriate action concerning the complaints of Respondent and other carmen



working under Mr. Wright at Stockton (*id.*). Neither Respondent nor his union further pursued remedies under the RLA and the contractual grievance procedures.

On October 13, 1981, Respondent was admitted to St. Joseph's Hospital in Stockton, where he was diagnosed as suffering from a major depression, a passive-aggressive personality disorder, and moderate obesity (Pet. App. 9a). Respondent was hospitalized for 17 days, and his doctor did not authorize his return to work until October 1, 1982 (*id.*).

2. On September 2, 1982, Respondent filed this FELA action in the United States District Court for the Eastern District of California. He alleged that Petitioner negligently and intentionally failed to provide a safe place to work by failing to prevent his fellow employees and foreman from harassing, intimidating and threatening him (Jt. App. 7). He claimed that friction with his supervisor had caused him severe mental and emotional injuries (*id.* at 7-8). He did not allege any physical contact or threat of physical contact.

Petitioner moved for summary judgment on the ground that the district court lacked subject matter jurisdiction over the action. The district court granted the motion (Pet. App. 8a-15a). The district court relied on decisions of this Court and the Court of Appeals for the Ninth Circuit holding that actions brought under state law are preempted where the labor-management disputes giving rise to such actions are subject to RLA-mandated grievance procedures set forth in collective bargaining agreements. *See Andrews* v. *Louisville & N. R.R. Co.*, 406 U.S. 320 (1972); *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).[2]

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[2] In *Andrews*, the petitioner claimed he had been wrongfully discharged and filed a state court action for breach of contract. This Court held that, because the collective bargaining agreement was the

Based on these cases, the district court found dispositive the fact that "[p]laintiff's injury flows directly from defendant's alleged failure to take appropriate disciplinary measures with regard to alleged misconduct by plaintiff's supervisor and several of his co-workers" (Pet. App. 14a). Because "[t]his type of wrongdoing . . . is directly related to the employer-employee relationship" (*id.*), the district court concluded that the claim was subject to the exclusive grievance procedures of the RLA. The district court also found it significant that (*id.*):

> Plaintiff has never suggested that he could not have invoked the grievance procedures contained in the collective bargaining agreement to address the harassment he was suffering. On the contrary, the fact that union representatives did submit a written grievance with regard to the perceived harassment by Mr. Wright indicates that the grievance procedures did apply to this type of dispute.[3]

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source of petitioner's right not to be discharged and of his employer's obligation to restore him to his regular employment following an injury, petitioner was required to follow the grievance procedures mandated by the RLA.

In *Magnuson*, a train dispatcher brought a common-law action for intentional infliction of emotional distress based on the railroad's alleged abuse of its investigatory and hearing processes leading to the dispatcher's discharge. The court of appeals, citing *Andrews*, held that the action was preempted because it was "based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A." 576 F.2d at 1369.

*Beers* was a state law action alleging that the employer had embarked upon a course of harassment amounting to intentional infliction of emotional distress. The court of appeals, citing *Magnuson*, again held that the action was preempted by the RLA.

[3] In the district court's view, the possible differences in the relief available under the two acts did not alter the exclusivity of the RLA procedures for resolving employer-employee disputes (Pet. App. 14a):

> [T]he Court must focus on the *source* of the injury rather than on the type of desired relief. Because the injury here had its genesis in a labor problem which constitutes a minor dispute within the meaning of the RLA, this Court is without jurisdiction to entertain plaintiff's claim. (Emphasis in original.)



3. The court of appeals reversed (Pet. App. 1a-7a), relying on essentially two grounds to support its conclusion that Respondent had stated a claim under the FELA. First, the court of appeals addressed "whether a Railroad employee's wholly mental injury stemming from his railroad employment is compensable under the [FELA]" (Pet. App. 2a). It held that a cause of action alleging solely emotional injuries is cognizable under the FELA, because in its view "the Act encompasses all reasonably foreseeable injuries which result from a railroad's failure to exercise due care with respect to its employees" (Pet. App. 3a).

Second, the court of appeals addressed the holding of the district court that, because the workplace dispute that gave rise to Respondent's complaint was subject to grievance procedures set forth in the collective bargaining agreement, the RLA made those procedures the exclusive remedy for Respondent's claims. The Ninth Circuit held that the principles set forth in *Andrews* and its progeny were not applicable to Respondent's claims, because those cases involved preemption of state law claims by federal laws, whereas this case was brought under the FELA (Pet. App. 7a). The court of appeals attempted further to distinguish the *Andrews* line of cases on the ground that Respondent's claim "is neither related to the collective bargaining agreement nor arguably governed by its provisions" (*id.*).[4]

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[4] This declaration by the court of appeals, for which it cited no authority or evidence in the record, is simply baffling in light of the fact that Respondent and other carmen initiated grievance procedures as provided in the collective bargaining agreement with respect to the very issues raised by Respondent in this case (Pet. App. 10a, 14a; Buell Dep. 36-37, 49-50). Moreover, it is wrong. As the district court found: "Plaintiff's injury flows directly from defendant's alleged failure to take appropriate disciplinary meas-

## SUMMARY OF ARGUMENT

This case involves the interaction of the two statutes that govern labor relations in the railroad industry. The Federal Employers' Liability Act makes railway employers liable for negligent injuries to their employees, and the Railway Labor Act provides mandatory, non-judicial procedures for resolving "*all* disputes growing out of grievances *or* out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151(a)(5) (emphasis supplied).

This case falls squarely within the RLA's language. Respondent's claim is a grievance dispute. As the district court noted, Respondent has never "suggested that he could not have invoked the grievance procedures contained in the collective bargaining agreement to address the harassment he was suffering" (Pet. App. 14a). Indeed, Respondent, in fact, initially attempted to resolve it pursuant to the grievance procedures set forth in the collective bargaining agreement for the resolution of such disputes. It is also a dispute concerning working conditions; Respondent's allegations concern only employment-related wrongdoings by his supervisor in the workplace.

Consequently, we do not understand Respondent to contend that Mr. Buell's grievance does not as a threshold matter fall squarely within the RLA's coverage. Rather, his position is that he has an option to pursue his claims in an FELA action and that the RLA is inapplicable to FELA cases.

Against this background, the case is subject to two alternative solutions, either of which is consistent with the language and policies of both of the relevant statutes and with the decisions of this Court.

First, cases arguably falling within the coverage of the Railway Labor Act should be resolved under the non-

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ures with regard to alleged misconduct by plaintiff's supervisor and several of his co-workers. This type of wrongdoing . . . is directly related to the employer-employee relationship" (Pet. App. 14a).



judicial procedures mandated by that Act unless Congress has specifically provided otherwise. The FELA provides no such exception. Sixty years of experience have shown that, if both statutes are reasonably construed, conflicts between the RLA and the FELA will rarely occur. But where they may, it is the RLA that should prevail, at least in a case like this one that squarely fits the classic RLA mold: a workplace disagreement between supervisor and employee over how their respective employment responsibilities can best be carried out.

The issue here concerns the proper forum—judicial or non-judicial—for resolution of workplace disputes arising out of grievances or arguably involving interpretation of a collective bargaining agreement. It is the RLA and not the FELA which addresses that precise question. Engrafted in 1926 onto a railroad regulatory scheme that already included the FELA, the RLA specifically provides a forum for the settlement of railroad workplace disputes whereas the FELA is a general safety statute providing a cause of action for negligence. Accordingly, in the rare case of a genuine conflict between the two statutes the later-enacted and more specific provisions of the RLA should prevail.

Second, the Court can resolve this case without having to choose between the RLA mandate of a non-judicial forum as the exclusive remedy for workplace disputes and the FELA's provision that railroad employees can sue their employers for negligent breaches of workplace safety. Federal statutes should be construed, where possible, so as to avoid conflicts between them. Here, the activity of which the plaintiff complains does not fall within the coverage of the FELA, and the case can be decided on that ground alone.

Respondent has not alleged either physical contact or physical injury. His sole allegation is that friction with his supervisor—arising out of work-related decisions and actions—has caused him emotional injury. The FELA should be interpreted as the district court interpreted it:

it does not cover workplace disagreements over how the job should be performed. Allegations of pure emotional injury, unaccompanied by physical contact or threat of physical contact, do not amount to assault, battery, or any other traditional tort. Nor do they arise from safety problems in the workplace. With the exception of the Ninth Circuit in this case, the courts of appeals have repeatedly held that such conduct does not fall within the FELA. This well-established interpretation of the FELA should be adopted not only because it is faithful to the language and purpose of the FELA itself, but also because it significantly diminishes the potential for conflict with the RLA.

## ARGUMENT

### I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE RLA DOES NOT APPLY TO THE DISPUTE BETWEEN RESPONDENT AND HIS SUPERVISOR AND THAT RLA GRIEVANCE PROCEDURES MAY BE BYPASSED MERELY BY ALLEGING CLAIMS FOR EMOTIONAL DISTRESS UNDER THE FELA.

The court of appeals erred in holding that Respondent's claims—a classic dispute over the supervisor's management of the workplace—are not subject to the grievance procedures of the RLA (Pet. App. 7a). This holding is plainly wrong as demonstrated by the fact that Respondent and other carmen initiated grievance procedures as provided in the collective bargaining agreement with respect to the very issues raised by Respondent in this case. Moreover, as this Court has held, Congress intended that the grievance procedures provided for minor disputes in the RLA were to be an exclusive—not an optional—remedy. The overly-narrow interpretation of the RLA applied by the court of appeals in this case—which permits a plaintiff to evade the grievance procedures mandated by the Act by the simple expedient of alleging emotional distress arising from a workplace dispute—directly undermines the salutary purposes underlying congressional railway labor policy.



#### A. Congress Intended The Grievance Provisions Of The Railway Labor Act To Be Broadly Interpreted.

The Railway Labor Act was passed in 1926, 44 Stat. 577, and amended in 1934, 48 Stat. 1185, to provide a comprehensive framework work for the resolution of labor disputes in the railroad industry, in view of the importance of that industry to the commerce of the whole nation.[5] Its stated purpose is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a(1).

To that end, the Railway Labor Act prescribes detailed procedures for the peaceful resolution of "*all* disputes concerning rates of pay, rules, or working conditions," 45 U.S.C. § 151a(4) (emphasis added)—the entire universe of railway labor-management controversies. These have been categorized into "major" and "minor disputes." *See Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 722-28 (1945). Disputes over the formation of or proposed changes in agreements concerning rates of pay, rules or working conditions—so-called "major" disputes—must be handled by means of detailed specific steps prescribed by the statute, including negotiation, mediation, arbitration, and conciliation. 45 U.S.C. §§ 155-60.

A "minor dispute" is one that involves either the meaning or application of an existing collective bargaining agreement or an employment dispute not covered by the agreement. *Elgin, J. & E. Ry. Co.* v. *Burley, supra*, 325

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[5] The 1934 amendments "related principally to the machinery for making the [statutory] procedures effective," *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50, 57-58 n.12 (1944), particularly with respect to arbitration of grievances and other "minor" disputes. *See Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U.S. 33, 36-37 (1963) (and cases cited therein); *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R.*, 353 U.S. 30, 40 (1957). The RLA was amended again in 1936 to apply to the airline industry (49 Stat. 1189, codified at 45 U.S.C. § 181 *et seq.*), and in 1951 (64 Stat. 1238-1239), 1964 (78 Stat. 748), and 1966 (80 Stat. 208).

U.S. at 723.[6] As defined, "minor disputes" cover the broad range of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. *Union Pacific R.R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978). In general, major disputes are those that result from the processes by which the collective bargaining agreement comes into existence, and minor disputes result from its interpretation and day-to-day application in the workplace.

Minor disputes are initially presented for resolution on the railroad property, up to the level of the chief operating officer desiginated to handle such disputes. 45 U.S.C. § 153 First (i). If the dispute is not resolved at this stage, it is then submitted to a division of the NRAB or to an arbitration board chosen by the parties, a so-called Public Law Board. *Id.* and § 153 Second. The members of the boards are chosen in equal numbers by the carriers and the unions, with a neutral referee to break any deadlocks. 45 U.S.C. § 153 First (a) and (e). The Board's awards, including monetary awards, are "final and binding upon both parties to the dispute." 45 U.S.C. § 153 First (m). *See generally Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R. Co.*, 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R. Co.*, 373 U.S. 33 (1963).

In *Gunther* v. *San Diego & A. E. Ry. Co.*, 382 U.S. 257, 261 (1965), this Court described Congress' purpose in providing the grievance mechanism set forth in the RLA:

> In § 3 Congress has established an expert body to settle "minor" grievances like petitioner's which arise from day to day in the railroad industry. The Railway Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances, that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs, and practices.[7]

[6] This Court has noted that railroad collective bargaining agreements include only a small portion of the rules governing day-to-day working conditions because "[w]here a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than most others." *Detroit & T. Shore Line R.R. Co.* v. *United Transp. Union*, 396 U.S. 142, 155 (1969). Disputes arising out of such "omitted cases" are nonetheless "minor" disputes under the RLA. *Burley, supra*, 325 U.S. at 723.



In 1985 alone, the nation's major rail carriers handled over 183,800 minor disputes at the level of the chief operating officer designated to handle such disputes for each carrier.[8] This number does not include the countless grievances settled on the railroads' properties at lower levels of management. Nor does it include the approximately 5,500 minor disputes resolved under the RLA in 1985 by the NRAB and the Public Law Boards.[9]

Congress made clear that the RLA is not to be interpreted narrowly. "The purpose of the [RLA]," Congress declared, is "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" (emphasis supplied). 45 U.S.C. § 151(a)(5).[10] Consistent with Con-

[7] The legislative history of the RLA makes clear that Congress was of the view that railroad employment disputes would be resolved most appropriately by individuals familiar with railroad customs and practices. For example, as Representative Cooper explained, adjustment boards "understand the problems by reason of their technical knowledge of the industry." *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)* (hereinafter "RLA Leg. Hist."), Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 93rd Cong., 2d Sess. 176 (1974). Similarly, Senator Watson stated that "problems" considered by the Adjustment Boards "are all of a technical nature, and therefore railroad men are required to decide them." RLA Leg. Hist. at 480.

[8] *See* Brief for Association of American Railroads and National Association of Railroad Trial Counsel as Amici Curiae in Support of Petition, at 8.

[9] *Id.* at 9.

[10] In addition to Section 151(a)(5), other provisions of the RLA make clear that "minor disputes" include "grievances" apart from

gress's mandate, courts have liberally construed the RLA's coverage. The clearest and most succinct statement of that coverage is contained in *Elgin, J. & E. Ry. Co.* v. *Burley, supra*, 325 U.S. at 723 where this Court held that the RLA's "all disputes" language applies not only to claims based on an interpretation of the collective bargaining agreement, but also those "claim[s] . . . founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement, e.g.*, claims on account of personal injuries" (emphasis supplied).[11]

Other federal courts—faithful to the congressional mandate to interpret the scope of the RLA broadly—have held that railroad employee claims of intentional infliction of

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those involving contract interpretation. For example, 49 U.S.C. § 153 First (i) provides that the "disputes between an employee . . . and a carrier or carriers growing out of *grievances or* out of the interpretation or application of agreements concerning rates of pay, rules or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" (emphasis supplied). Similarly, 49 U.S.C. Section 152 First states that "[i]t shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements *or otherwise. . . .*" (emphasis supplied).

[11] The legislative history of the RLA also supports the conclusion that Congress intended the category of "minor disputes" to be broadly interpreted. For example, Representative Barkley, one of the sponsors of the Act in the House, stated that the Adjustment Boards were created to consider "disagreements over grievances, interpretations, discipline, and other technicalities that arise from time to time in the workshop and out on the tracks in the operation of the roads." RLA Leg. Hist. at 210. Similarly, Senator Watson stated that the category of minor disputes "are ordinarily called grievances," which "may be of a personal nature . . . may involve a great many employees . . . may involve a few employees . . . [or] may involve but one employee." *Id.* at 477.



emotional distress,[12] retaliatory discharge,[13] and slander [14] all constitute disputes subject to RLA grievance procedures where those claims arise out of day-to-day grievances. These holdings have included claims filed under the FELA.[15] The courts of appeals have also held that railway labor disputes that are "inextricably intertwined with the grievance machinery of the collective bargaining agreement" constitute minor disputes subject to the RLA.[16] Read collectively, these cases make clear that it is the *source* of a railroad employee's alleged injury, and not the remedy that he might prefer to pursue, that determines whether a dispute is subject to the RLA.

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[12] *See, e.g., Adkins* v. *Chesapeake & Ry. Co.*, No. 85-1204 (4th Cir., Oct. 3, 1985) (unpublished decision, Pet. App. 16a-17a); *Antalek* v. *Norfolk and Western Ry. Co.*, No. 84-3057 (6th Cir., Aug. 30, 1984) (unpublished decision, Pet. App. 22a-24a); *Choate* v. *Louisville & N. R.R. Co.*, 715 F.2d 369 (7th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc., supra*, 576 F.2d at 1369.

[13] *See, e.g., Minehart* v. *Louisville & N. R.R. Co.*, 731 F.2d 342 (6th Cir. 1984); *Landfried* v. *Terminal R.R. Ass'n*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

[14] *See, e.g., Evans* v. *Missouri Pacific R.R. Co.*, 618 F. Supp. 930 (E.D. Mo. 1985); *Fraley* v. *Hayes*, 112 BNA LRRM 2298 (S.D. Ill. 1982); *Carson* v. *Southern Ry. Co.*, 494 F. Supp. 1104 (D.S.C. 1979).

[15] *See, e.g., Adkins* v. *Chesapeake & O. Ry. Co., supra*; *Antalek* v. *Norfolk and Western Ry. Co., supra*; *Landfried* v. *Terminal R.R. Ass'n, supra*; *Jackson* v. *Consolidated Rail Corp., supra*; *Sharkey* v. *Penn Central Transp. Co.*, 493 F.2d 685, 688 (2d Cir. 1974); *Beanland* v. *Chicago, R.I. & Pac. R.R.*, 480 F.2d 109, 113 (8th Cir. 1973).

[16] *See, e.g., Antalek* v. *Norfolk and Western Ry. Co., supra*, Pet. App. 23a; *Magnuson* v. *Burlington Northern, supra*, 576 F.2d at 1369. *See also Allis-Chalmers Corp.* v. *Lueck*, 105 S.Ct. 1904, 1912 (1985) (where tort claim is "inextricably intertwined with consideration of the terms of the labor contract" that claim is pre-empted under Section 301 of the Labor Management Relations Act).

**B. The Court Of Appeals Erred In Holding That The Dispute At Issue Here—A Disagreement Between An Employee And His Supervisor Over Working Conditions—Was Not A Minor Dispute.**

The court of appeals' fundamental error is its conclusion that Respondent's "complaint does not constitute a 'minor dispute' within the exclusive jurisdiction of the Board because it is neither related to the collective bargaining agreement nor arguably governed by its provisions" (Pet. App. 7a).

Congress has declared that the purpose of the RLA is "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretatation or application of agreements covering rates of pay, rules, or working conditions" (emphasis supplied). 45 U.S.C. § 151(a)(5). Respondent's allegations concerning his treatment by his foreman place this case right at the core of RLA coverage. As described above (at 3-4), those allegations fall in three categories:

—allegations challenging work directions given to Respondent by his supervisor, Mr. Wright;

—allegations that Mr. Wright failed to take appropriate disciplinary measures against co-workers who allegedly harassed Respondent; and

—allegations that Mr. Wright had improperly threatened to fire Respondent.

These allegations constitute a classic employer-employee "dispute growing out of grievances" in the shop and events that occurred there. Disputes between employees and their supervisors—even if characterized as a "pattern of harassment"—have consistently been held to be "minor disputes." *See, e.g., Adkins* v. *Chesapeake and Ohio Ry., Co., supra,* Pet. App. 18a (alleged harassment by supervisor); *Antalek* v. *Norfolk and Western Ry. Co., supra,* Pet. App. 22a-23a (supervisors allegedly engaged "in a course of harassment, intimidation and conspiracy to terminate [plaintiff's] employment"); *Choate* v. *Louisville and N. R.R. Co., supra,* 715 F.2d at 370 ("continuing course of conduct by [supervisors] including threats of dismissal, punishment, and improper attempts to discipline plaintiff"); *Beers* v. *Southern Pacific Transp. Co., supra,* 703 F.2d at 427-429 ("course of harassment" involving work conditions and disciplinary procedures);[17] *International Ass'n of Machinists & Aerospace Workers* v. *Northwest Airlines,* 673 F.2d 700 (3rd Cir. 1982) (alleged harassment and threats of suspension).



Similarly, this Court and other courts have consistently held that all such claims, including wrongful discharge claims, are subject to the exclusive grievance procedures mandated by the RLA. *See, e.g., Andrews* v. *Louisville & N. R.R. Co., supra; Minehart* v. *Louisville & N. R.R. Co., supra; Landfried* v. *Terminal R.R. Ass'n, supra.* Wrongful discharge claims arise only after the employment relationship has been severed. Where, as in Mr. Buell's case, the claim in part arises from an alleged *threat* to discharge, the employment relationship continues. RLA coverage for discharge threats follows *a fortiori,* therefore, from cases holding that actual discharges are covered. *See Choate* v. *Louisville and N. R.R. Co., supra,* 715 F.2d at 371-72; *Independent Union of Flight Attendants* v. *Pan American World Airways, Inc.,* 789 F.2d 139, 141 (2d Cir. 1986).

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[17] The court of appeals attempted to distinguish this case from *Beers* on the ground that the latter case involved a claim for wrongful discharge. This characterization of *Beers* is simply erroneous. In *Beers,* plaintiff brought a common law claim for emotional distress based on allegations, apart from his discharge, involving "work conditions, disciplinary procedures [and] representation rights." 703 F.2d at 429. The Ninth Circuit in *Beers* held that such "complaints could have been brought before the NRAB" and that therefore they were "a minor dispute within the exclusive province of the grievance mechanisms of the Railway Labor Act." *Id.*

Moreover, contrary to the Ninth Circuit's holding, Respondent's allegations are "arguably governed" by the collective bargaining agreement. Indeed, the governance is more than arguable; it is clear. For example, Rule 40 of the collective bargaining agreement governs discipline of employees. Under Rule 40, "no employee shall be disciplined without first being given a fair and impartial investigation." Court of Appeals Excerpts of Record, Tab 42, Exhibit C. The Rule also spells out the components of a proper investigation including prior notice to the employee and the employee's right to have union representation and to secure witnesses at the hearing. Rule 40 clearly covers Respondent's allegations that his co-workers were too leniently disciplined or that he was improperly threatened with discharge. Indeed, Respondent's own actions demonstrate that his dispute is subject to the bargaining agreement's grievance procedures. He and other carmen, with the aid of their union, initiated such procedures with respect to the very issues raised by Respondent in this case (Pet. App. 10a, 14a; Buell Dep. 36-37, 49-50.)[18]

Moreover, decisions of the NRAB itself repeatedly confirm that remedies are available under the RLA to resolve the very type of disputes raised by Respondent in this case.[19] For example, Resepondent's claims that he was given conflicting or improper instructions are precisely the type of claims that the NRAB was designed to resolve. Adjustment boards have consistently ruled that, in the absence of a risk of physical danger, "if an employee considers an order improper or unreasonable, his proper course is necessarily to comply with the order immediately, and if he desires, to contest it later through the

[18] Remarkably, the court of appeals made no reference to the facts that Respondent and his union had initiated the grievance procedures or even that the collective bargaining agreement included Rule 39, which explicitly provides such procedures.

[19] These cases are described in greater detail in the Brief of the National Railway Labor Conference as *Amicus Curiae* in Support of Petitioner, at Section II.D.



orderly processes of the grievance machinery." NRAB Second Division Award No. 6910, at 2 (August 15, 1975); *see also* NRAB Third Division Award No. 22525, at 3 (Sept. 28, 1979) ("It is well settled that employees must comply with instructions of superior officers and then complain later if they think they have been mistreated. . . ."). Similarly, NRAB decisions confirm that an employee—such as Respondent—who claims that he has been harassed by his supervisor may initiate a grievance. *See, e.g.*, NRAB Third Division Award No. 22157, at 2 (July 31, 1978) ("Claimant's recourse was to do the work and file a grievance to redress the wrong if he felt his supervisor's instructions were unfair or discriminatory. That is the whole purpose of the grievance procedure.")

In sum, the holding of the court of appeals that Respondent's disputes with his supervisor did not constitute a "minor dispute" as defined by the RLA plainly conflicts with the broad language of that Act, consistent interpretations of the Act by the courts and the NRAB, and Respondent's initiation of a grievance concerning the same conduct about which he complains in the present action. Congress explicitly provided that the types of disputes subject to the RLA grievance procedures go beyond simply those disputes involving contract interpretation. *See* 45 U.S.C. §§ 151(a)(5), 152 First, 153 First (i). Consistent with these provisions, over forty years ago this Court in *Burley* held that the RLA extends not only to claims arising out of the bargaining agreement but also to claims "founded upon some incident of the employment relation . . . independent of those covered by the collective agreement." 325 U.S. at 723. The Ninth Circuit has departed from that principle, and its error must be corrected.

### C. The RLA Grievance Procedures Provide The Exclusive Remedy For Claims Within RLA Coverage.

As long as the Railway Labor Act and the Federal Employers' Liability Act are reasonably construed—in harmony with their respective provisions and purposes, and

in the light of the principle that companion federal statutes should be interpreted if possible to avoid the partial repeal of either—there should be few cases of real overlap and therefore conflict between the two. That is, there should be few cases in which the RLA requires a nonjudicial resolution, while at the same time the FELA provides a judicial remedy.

For the reasons stated in Part II, we believe that this is not one of those rare cases. Respondent has not alleged a traditional tort cognizable under the FELA and, to avoid needless conflict with the RLA, the FELA should not be construed to cover allegations which do not involve physical contact, threats thereof or physical injury. Nothing in the FELA's language or purpose requires such an interpretation.

However, in the event the Court should disagree with our submission in Part II and conclude that Respondent's claim is cognizable under the FELA, then the overlap and consequent conflict will exist in this case. The Court must then decide which of the two statutes prevails in the unusual circumstance where a workplace disagreement between supervisor and employee arguably subject to the collective bargaining agreement also sounds in tort.

We submit that in such cases of conflict, the more specific provisions of the later-enacted RLA must prevail. *See, e.g., Brotherhood of Railroad Trainmen* v. *Chicago River and Ind. R.R. Co.*, 353 U.S. 30, 40-42 (1957).

Section 2 of the RLA, 45 U.S.C. § 152, mandates that "[i]t shall be the duty of all carriers . . . and [their] employees . . . to settle all disputes, whether arising out of [collective bargaining] agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The statute means what it says. Minor disputes must be submitted to the NRAB, which has exclusive jurisdiction to resolve them. *Andrews* v. *Louisville & N. R.R.*



*Co., supra*, 406 U.S. at 322, 325. As this Court stated in *Locomotive Engineers* v. *Louisville & N. R.R. Co.*, 373 U.S. 33, 38-39 (1963), the grievance procedures provided under the RLA constitute "a mandatory, exclusive, and comprehensive system for resolving grievance disputes . . . [and were] intended by Congress to be the complete and final means for settling minor disputes." [20]

This Court's decision in *Andrews* v. *Louisville & N.R. Co.*, controls this case. The issue in *Andrews* was whether the RLA's grievance mechanisms were "optional," leaving the states free to afford an alternative remedy to a discharged railroad employee under the State's law of contracts. This Court flatly rejected that proposition, stating (406 U.S. at 322):

> Thus, the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law.[21]

This Court's holding in *Andrews* has been followed in numerous subsequent cases including a consistent line in which courts have held that the existence of RLA grievance procedures precludes pursuit of tort remedies under state law.[22]

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[20] The Court further clarified in *Union Pacific R.R. Co.* v. *Sheehan, supra*, 439 U.S. at 94, that:

> The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions . . . Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts.

*See also Walker* v. *Southern Ry. Co.*, 385 U.S. 196, 198 (1966); *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 39 (1957).

[21] The Court in *Andrews* expressly overruled a contrary holding in *Moore* v. *Illinois Central R.R. Co.*, 312 U.S. 630 (1941).

[22] *See, e.g., Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Choate* v. *Louisville*

The court of appeals, however, declined to apply *Andrews* and its progeny, stating (Pet. App. 7a):

> The question before us is . . . not whether a state law claim is preempted by federal law but whether there is any reason under federal law to limit a railroad employee's right to relief under the FELA for emotional injury. We conclude that there is none.

The court of appeals has misread *Andrews*. The controlling question is not whether Respondent's allegations are cognizable under the FELA.[23] Respondent's claims arise out of a workplace dispute subject to the RLA, and the grievance procedures of that Act provide the *exclusive* remedy for such claims.

In enacting the RLA, Congress used the broadest possible language to define its scope, stating that its provisions should apply "to all disputes growing out of grievances." 45 U.S.C. § 151(a)(5). *See also* 45 U.S.C. § 152 First and Second. Congress further specified that all such disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes . . ." 45 U.S.C. § 153 First (i). Congress said "shall," not "may." In supporting the 1934 amendment to the RLA, labor representatives made it clear that "[t]he employees were willing to give up their remedies outside of the statute provided that a workable and binding statutory scheme was established to settle grievances." *Union Pacific R.R.* v. *Price*, 366 U.S. 601, 613 (1959).[24] As this Court held in

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*& N. R.R. Co.*, 715 F.2d 369 (7th Cir. 1983); *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Koehler* v. *Illinois Central Gulf R.R. Co.*, 109 Ill. 2d 473, 488 N.E.2d 542 (1985).

[23] *See* section II of the argument, *infra*.

[24] The legislative history of the RLA in other places also supports the conclusion that Congress intended the RLA grievance procedures—as opposed to traditional judicial remedies—to be the exclusive remedy for disputes subject to the Act. For example, Representative Jacobstein stated that the Act "*keeps out the lawyers in the adjustment of labor disputes*, because it throws back upon organized labor and upon the executives themselves the responsibility for settling disputes." RLA Leg. Hist. at 305 (emphasis supplied). Similarly, Representative Barkley, one of the proponents of the Act in the House, stated, "[t]he history of railroading in this country has demonstrated that the most satisfactory method of adjustment of all railroad disputes involving labor and working conditions has been when the men on both sides were permitted to sit down at a table and settle their own disputes *without interference from the outside*." RLA Leg. Hist. at 194 (emphasis supplied).



*Andrews*, Congress did not intend the RLA's procedures to be optional—and there is no more reason to ignore that statutory command for federal tort cases than for state tort cases.

The Seventh Circuit reached precisely this conclusion in *Lancaster* v. *Norfolk and Western Ry. Co.*, 773 F.2d 807 (7th Cir. 1985), *pet. for cert. pending*, No. 85-1702. While the *Lancaster* court observed that "the question of where to draw the line between the Railway Labor Act and the Federal Employers' Liability Act is distinct from that of the scope of preemption of state tort law by the Railway Labor Act" (773 F.2d at 813), it was also of the view that "the two questions should be decided consistently." *Id.* The reason is that:

> They involve the same underlying issue: whether the defendant's misconduct, although tortious, is the sort of conduct that Congress, if it had thought about the matter, would have wanted to channel through the grievance machinery set up by the Railway Labor Act; or instead the sort of conduct that Congress would have wanted to leave, concurrently or exclusively, to state or federal tort remedies. *Id.* at 813-14.[25]

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[25] Although the Seventh Circuit correctly held that "the two questions should be decided consistently," the *Lancaster* court erred, for reasons discussed below (at 27-28 n.29), in holding that minor disputes involve only questions of contract interpretation and in

There can be no question that Congress intended day-to-day disputes between railway employees and their supervisors concerning working conditions—such as Respondent's claims here—to be resolved by means of the RLA's grievance procedures. That intention would be thwarted if a plaintiff could evade the RLA procedures simply by turning an employment dispute into a tort action "by artful pleading," whether it be under state or federal law. Indeed, a different panel of the Ninth Circuit explicitly held that grievances could not be recharacterized as tort claims for emotional distress by the simple contrivance of "artful pleading" in *Magnuson* v. *Burlington Northern, Inc., supra,* 576 F.2d at 1369:

> Every employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged. Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge. If the pleading of emotional injury permitted aggrieved employees to avoid the impact of the R.L.A., the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted.[26]

The issue presented here concerns the congressional choice of a forum. The RLA deals with the forum issue head-on. It specifically provides that workplace disputes and disputes arguably subject to the collective bargaining agreement come under the exclusive jurisdiction of the

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suggesting that even where claims are subject to RLA grievance procedures they may be alternatively asserted in court under the FELA.

[26] *See also Allis-Chalmers Corp.* v. *Lueck,* 105 S. Ct. 1904, 1915 (1985) ("Since nearly any alleged willful breach of a contract can be restated as a tort claim for breach of good-faith obligation under a contract, the arbitrator's role [in resolving grievances arising out of collective bargaining agreements under the Labor Management Relations Act] in every case could be bypassed easily if § 301 [of the LMRA] is not understood to pre-empt such [tort] claims.")



National Railway Adjustment Board. At the time Congress provided this exclusive nonjudicial remedy, the FELA was already on the books. The RLA explicitly repealed "all Acts and parts of Acts in conflict" with its provisions. 45 U.S.C. § 163. If Congress had intended to make an exception for the FELA, it would have said so. Where Congress intends to allow an employee with a grievance subject to the procedures of the RLA to elect whether to proceed under that Act or to avail himself of some other remedy under another statute, it has done so specifically and unequivocally, as it did in the Federal Rail Safety Act.[27] There is no such exception for FELA cases. Even assuming, therefore, that this case can be recast as an FELA case, it is nevertheless governed by the Railway Labor Act.

## II. THE COURT OF APPEALS ERRED IN HOLDING THAT ALLEGATIONS ARISING OUT OF A WORKPLACE DISPUTE BETWEEN AN EMPLOYEE AND HIS SUPERVISOR STATE A CLAIM UNDER THE FELA.

Respondent's allegations arise out of his disagreement with his foreman's supervision of the workplace. Respondent asserts that the procedures he was instructed to follow were improper, that his co-employees had not been appropriately disciplined, and that his supervisor had improperly threatened to dismiss him.

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[27] 45 U.S.C. § 441 (Protection and Rights of Employees) provides:

> "(c) (1) Any dispute, grievance or claim arising under this section shall be subject to resolution in accordance with the procedures set forth in Section 153 of this title [the RLA].
>
> * * * *
>
> (d) Whenever an employee of a railroad is afforded protection under this Section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must elect either to seek relief pursuant to this Section or pursuant to such other provision of law."

Even assuming the truth of these allegations, they are not cognizable under the FELA. The Ninth Circuit's decision to the contrary unnecessarily creates tension between the RLA and FELA. This conflict can and should be avoided by holding that, because the *source* of Respondent's alleged injury is a disagreement with his supervisor's day-to-day management of the workplace, those claims do not properly arise under the FELA. This is what the district court correctly held.

Originally enacted in 1906, the FELA, 45 U.S.C. § 51 *et seq.*, a safety statute, creates a tort remedy for railroad workers injured on the job.[28] The statute's main purpose was to provide incentives for the creation of a safer workplace by eliminating a number of traditional defenses to tort liability, including contributory negligence, contractual waiver of liability, the fellow-servant rule, and assumption of risk. *See* 45 U.S.C. §§ 51, 53-55; H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908); S. Rep. No. 460, 60th Cong., 1st Sess. (1908); S. Rep. No. 661, 76th Cong., 1st Sess. (1939). The FELA was enacted to supplant state tort actions, and the Act preempts state law within its domain. *Mondou* v. *New York, New Haven and Hartford R.R. Co.*, 223 U.S. 1 (1912); *Janelle* v. *Seaboard Coast Line R.R. Co.*, 524 F.2d 1259, 1261 (5th Cir. 1975).

Congress believed these departures from the common law were justified by the physically hazardous nature of the railroad industry. *See, e.g.*, S. Rep. No. 460, *supra*, at 1-3; H.R. Rep. No. 1386, *supra*, at 2. The FELA was intended to "make the employer liable for injury caused by defects or insufficiencies in the roadbed, tracks, engines, machinery and other appliances used in the operation of railroads." H.R. Rep. No. 1386, *supra* at 2. Clearly, the FELA was enacted as a safety statute. There is nothing in the legislative history to support the conclusion that Congress intended the FELA to provide a remedy for purely emotional injuries arising out of workplace disputes between rail employees and their employers.

[28] As originally enacted, the Employers' Liability Act, 34 Stat. 232 (1906), was held to be unconstitutional on the ground that it applied to intrastate as well as interstate commerce. *Employers' Liability Cases*, 207 U.S. 463 (1908). The version of the FELA passed in 1908 was substantially the same as the 1906 Act, except that it was limited to employees engaged in interstate commerce. S. Rep. No. 460, 60th Cong., 1st Sess. 1 (1908).



Notwithstanding this fact, in recent years cases have increasingly been filed in which railway employees have alleged claims under the FELA (often for emotional distress) arising directly out of disputes with their supervisors. Where the supervisor's conduct has not involved physical contact, threat thereof, or physical injury, these claims generally have been rejected. In two of these cases the courts of appeals held that claims for mental or emotional distress arising from workplace disputes are directly related to the employer-employee relationship and thus must be resolved pursuant to the grievance procedures required by the RLA. *Adkins* v. *Chesapeake & O. Ry. Co.*, No. 85-1204 (4th Cir., Oct. 3, 1985) (unpublished decision, Pet. App. 16a-17a); *Antalek* v. *Norfolk and Western Ry. Co.*, No. 84-3057 (6th Cir., Aug. 30, 1984) (unpublished decision, Pet. App. 22a-24a). *See also Lancaster* v. *Norfolk and Western Ry. Co.*, 773 F.2d 807, 813-15 (7th Cir. 1985).[29] In two other cases the

[29] The Seventh Circuit in *Lancaster* held that "the FELA does not reach torts which work their harm through nonphysical means." 773 F.2d at 815. As that court explained (*id.* at 813):

> The reason why the question whether the Railway Labor Act supplants any part of the Federal Employers' Liability Act tends not to arise may be the following: the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact —an act such as telling a man he's fired, which is precisely the type of act for which the Railway Labor Act provides a swift and adequate remedy.

Respondent plainly has not met the test set forth in *Lancaster*, because he has not alleged any physical contact.

Although the Seventh Circuit properly attempted to interpret the RLA and FELA in a manner that would avoid conflicts between

courts held that the FELA does not create a cause of action for retaliatory discharge and that the exclusive remedy for such a claim lies in the RLA-mandated grievance procedures. *Landfried* v. *Terminal R.R. Ass'n.*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983) *cert. denied*, 465 U.S. 1007 1984).[30]

These decisions reject the Ninth Circuit's reasoning that a claim for purely emotional injuries is cognizable under the FELA even where such alleged injuries directly arise out of a railway employee's disenchantment with the conduct of his foreman. As the district court found (Pet. App. 14a):

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the two statutes, that court erroneously held that the RLA applies *only* to grievances involving the interpretation of collective bargaining agreements. 773 F.2d at 814. In so holding, the Seventh Circuit's decision was expressly premised on the theory that Congress did not mean what it said in drafting the RLA (*see* 45 U.S.C. §§ 151a, 153 First (i)), and that this Court erred in interpreting the Act in *Burley*. 773 F.2d at 814. The Seventh Circuit was correct in one respect: its rationale cannot be squared with *Burley's* holding that the RLA applies to claims "independent of those covered by the collective agreement." 325 U.S. at 773. *A fortiori* the Ninth Circuit's rationale here cannot. *Burley*, we submit, is correct, and both the Seventh and Ninth Circuits erred in applying an overly-narrow interpretation of the RLA and an overly-broad interpretation of the FELA.

[30] *See also Yawn* v. *Southern Ry. Co.*, 591 F.2d 312 (5th Cir.), *cert. denied*, 442 U.S. 934 (1979); *Forgione* v. *United States*, 202 F.2d 249 (3rd Cir.), *cert. denied*, 345 U.S. 966 (1953) (false arrest and false imprisonment not cognizable under FELA); *McSorely* v. *Consolidated Rail Corp.*, 581 F. Supp. 642 (S.D.N.Y. 1984). In *Yawn*, the court held that "[i]f an employee can establish physical injury caused by carrier negligence, he is entitled to damages under the FELA." *Id.* at 317. In this case, however, Respondent has not met the Fifth Circuit's physical injury test because, as the Ninth Circuit acknowledges, this case involves "wholly *mental* injury" (Pet. App. 2a).



> Plaintiff's injury flows directly from defendant's alleged failure to take appropriate disciplinary measures with regard to alleged misconduct by plaintiff's supervisor and several of his co-workers. This type of wrongdoing . . . is directly related to the employer-employee relationship . . . [T]he Court must focus on the *source* of the injury rather than on the type of desired relief. Because the injury here had its genesis in a labor problem which constitutes a minor dispute within the meaning of the RLA, this Court is without jurisdiction to entertain plaintiff's claim.

Each of the above-cited decisions from four separate circuits stands squarely for the proposition that in a case such as this one—a claim of non-physical injury arising out of the employment relationship—the claim against the carrier does not lie under the FELA. We submit that the district court applied the proper test in those circumstances, and that the Ninth Circuit erred in failing to apply these sensible principles in this case.

The Ninth Circuit's error ultimately rests on its failure to honor the principle of statutory construction that federal statutes are to be interpreted, if possible, so as not to create tension with other federal statutes. *See, e.g., Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Watt* v. *Alaska*, 451 U.S. 259, 266-67 (1981); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974). In this context, that objective is easily achievable, as the holdings of other federal courts attest. So long as the RLA is given its traditional, usually understood meaning as being applicable to employer-employee, workplace type disputes (such as failure properly to control supervisory personnel), and the FELA is given its traditional, usually understood meaning as applying to claims involving railway safety, there may be some instances of tension between the two federal statutes, but they will be rare.

The Ninth Circuit in this case, by contrast, has gone out of its way to create conflict between the two statutes by giving an unnecessarily crabbed interpretation to the

RLA and an unnecessarily expansive interpretation to the FELA.[31] Disagreements between railroad workers and their supervisors over the proper performance of their respective duties are an inevitable consequence of running a railroad. Clearly, it was Congress' intent that such disputes be resolved by arbitration under the RLA, and most of the courts of appeals have upheld that intent. Under the Ninth Circuit's decision, however, disgruntled employees will be free to channel the most elementary dispute between supervisor and employer into the courts under the FELA. This Court should correct that error by reversing the decision of the court of appeals.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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July 18, 1986

[31] Indeed, in a case decided subsequent to the opinion in this case, another panel of the Ninth Circuit expressed "reservations" about the interpretation of the FELA in the decision here under review, but felt itself bound to follow it as the law of the circuit. *Taylor* v. *Burlington Northern R.R. Co.*, 787 F.2d 1309, 1313 (9th Cir. 1986).



## ATTACHMENT A

## STATEMENT REQUIRED BY RULE 28.1

Listed below are all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of the Petitioner The Atchison Topeka & Santa Fe Railway:

Santa Fe Southern Pacific Corporation
Advertising Direction, Inc.
Alameda Belt Line
B & C General Agency, Inc.
The Belt Ry. Co. of Chicago
Central California Traction Co.
Cerrillos Land Co.
Chula Vista Bayfront Investment Co.
The Clinton and Oklahoma Western R.R. Co.
The Denver Union Terminal Ry. Co.
The Dodge City and Cimarron Valley Ry. Co.
Fresno Interurban Ry. Co.
Gallo Wash Coal Co.
The Garden City, Gulf and Northern R.R. Co.
The Gulf and Inter-State Ry. Co. of Texas
Gulf Central Pipeline Co.
Gulf Central Storage and Terminal Co.
Gulf Central Storage and Terminal Co. of Nebraska
Haystack Mountain Development Co.
Hospah Coal, Co.
Houston Belt & Terminal Ry. Co.
Joliet Union Depot Co.
Kansas City Terminal Ry. Co.
The Kansas Southwestern Ry. Co.
Keokuk Union Depot Co.
Kirby Forest Industries, Inc.
Limited Partnership Management, Inc.
Los Alamos Constructors, Inc.
Los Angeles Junction Ry. Co.
McKee Building Services, Inc.
Robert E. McKee, Inc.
The Oakland Terminal Ry.

Oklahoma City Junction Ry. Co.
Pintada Coal Co.
Rio Grande, El Paso and Santa Fe R.R. Co.
SF Coal Corp.
SF Energy Co. of Columbia
SF Energy Co. of Indonesia
SF Energy Co. of Indonesia (Bunyu Block)
SF Energy Co. of Indonesia (Java Basin (A))
SF Energy Co. of Indonesia (Java Basin (B))
SFM Nebraska, Inc.
SF Minerals Corp.
SGSI Corp.
St. Joseph Terminal R.R. Co.
San Diego Pipeline Co.
Santa Fe Capital Inc.
Santa Fe Energy Co.
Santa Fe Energy Co. of Tunisia
Santa Fe Energy Products Co.
Santa Fe Forwarding Co.
Santa Fe Industrial Realty Co.
Santa Fe Industries, Inc.
Santa Fe Land Improvement Co.
Santa Fe Marketing Co.
Santa Fe Mining, Inc.
Santa Fe Natural Resources, Inc.
Santa Fe Oil Co.
Santa Fe Pacific Fuels Co.
Santa Fe Pacific R.R. Co.
Santa Fe Pipeline Co.
Santa Fe Pipelines, Inc. (Delaware)
Santa Fe Rail Equipment Co.
Santa Fe Southern Pacific Corporation
Santa Fe Southern Pacific Foundation
Santa Fe Terminal Services, Inc.
Santa Fe Towers Land Co.
Santa Fe Transportation Co. (California)
Southern Pacific & Santa Fe Railway Co.
Southwest Pipe Line Co.



Standard Office Building Corp.
Star Lake Railroad Co.
Sun Country Construction Co.
Sunset Railway Co.
Texas City Terminal Ry. Co.
Trailer Train Co.
Transit Ice Co.
Walker-Kurth Lumber Co.
The Wichita Union Terminal Ry. Co.
The Zia Co.

# RESPONDENT'S

# BRIEF

No. 85-1140

Supreme Court, U.S.
FILED
SEP 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Petitioner,*

vs.

JIM BUELL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Does the Railway Labor Act ("RLA") negate the operation of the Federal Employers' Liability Act ("FELA") for any injury suffered on an FELA covered jobsite if the injured worker either invoked or could have invoked RLA grievance procedures to protest the unsafe condition that caused the worker's injury?

2. Does the factual record developed by discovery proceedings conducted by the parties and reviewed by the trial court for the purpose of resolving a particular FELA point of law provide an adequate basis for resolving a second, basically unrelated, legal issue under the FELA?

3. Does a worker injured by employer negligence have a cause of action under the FELA when the worker's psychiatric injury is caused by common law assault, is in part caused by physical contact and has physical consequences?

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No. 85-1140

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Petitioner,*

vs.

JIM BUELL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit in this matter is reported at 771 F.2d 1320 (9th Cir. 1985). The unreported opinion of the District Court in this matter is included in the Appendix to the Petition (Pet. App. 8a-15a).

## STATUTES INVOLVED

Title I, Section 2 of the Railway Labor Act ("RLA"), as amended, 45 U.S.C. § 151a, provides in pertinent part:

> The purposes of the Chapter are (1) to avoid any interruption to Commerce or to the operation of any carrier engaged therein . . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 5 of the FELA, 45 U.S.C. section 55, provides in pertinent part:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . .

## STATEMENT OF THE CASE

This statement goes into considerable detail concerning the issue that was before the District Court when it rendered the summary judgment that was reversed by the Ninth Circuit. This is necessary to apprise this Court of the facts that support Buell's argument that it would be premature for this Court to consider the abstract question of whether recovery for purely psychiatric injury is authorized under the FELA. An elaborate review of many facts developed in the record of this case that are unmentioned in the District Court and the Ninth Circuit opinions is also included. Those lower court summaries of fact are inadequate because the only issue before the trial court was one of law on which all relevant facts were virtually uncontested.

In September of 1982, Respondent Jim Buell filed a complaint in the United States District Court for the Eastern District of California to commence the instant action. Buell alleged in his complaint that he had suffered an emotional breakdown (Joint Appendix, ("J.A.") 7, para IV) as a direct and proximate result of negligent and unlawful acts of the petitioner, The Atchison, Topeka and Santa Fe Railway ("Santa Fe"), and that he sought judgment against Santa Fe for medical expenses, lost earning capacity and general damages pursuant to the provisions of the FELA.

Buell's Complaint more specifically alleged that he was, at all times relevant, employed by Santa Fe as a worker (a "carman"—para II of Complaint, J.A. 7) and that Santa Fe failed to provide him with a safe place to work. As one example of Santa Fe conduct that made his workplace unsafe, the Complaint alleged that Santa Fe had either negligently or intentionally allowed Buell's fellow workers, particularly Buell's worksite foreman, Ed Wright, to "harass, threaten [and] intimidate" Buell "maliciously and oppressively, negligently, and intentionally, in order to cause personal injury . . . and mental and emotional suffering . . . " (para IV of Complaint, J.A. 7). The threats, harassment and intimidation caused Buell's emotional breakdown. (para IV of Complaint, J.A. 7.)



The Answer filed by Santa Fe contained the expectable denials and, as an affirmative defense, the claim that Buell's exclusive remedy for the injuries he alleged was "before the [National] Railway Labor Adjustment Board" (Fifth Affirmative Defense, J.A. 11). This legal defense was the sole basis for Santa Fe's motion for summary judgment pursuant to FRCP 56. The motion was predicated on the argument that Buell's claim for damages was within the exclusive jurisdiction of the National Railway Adjustment Board or other board authorized by the Railway Labor Act, and the District Court was therefore "without subject matter jurisdiction to hear plaintiff's claims [for injuries]." This lack of subject matter jurisdiction was assertedly because "plaintiff's Complaint involves a 'minor dispute' squarely within the meaning of the Railway Labor Act or, alternatively, that plaintiff's Complaint involves a matrix of facts inextricably intertwined with the grievance machinery of the collective bargaining agreement and the Railway Labor Act." (Court of Appeals Excerpts of Record ("Excerpts"), Tab 42, page 2.)

Santa Fe chose to base its motion on the sole ground that the source of the injury alleged by Buell controls the issue of whether Buell's claim concerning his injury was properly the subject of a grievance proceeding under the RLA or an action in federal district court under the FELA. To support its argument, Santa Fe cited decisions holding that the RLA grievance procedures preempted state law causes of action as authority that the RLA could preclude application of the FELA. (See Santa Fe Motion, Excerpts, Tab 42 pages 10-12.) The District Court accepted Santa Fe's legal argument, stating:

> Plaintiff [Buell's] argument that the relief sought here differs from that available under the collective bargaining agreement and the RLA misses its mark. *Magnuson* and *Beers* [two RLA-state law preemption decisions of the Ninth Circuit] teach us that the Court must focus on the *source* of the injury rather than on the type of desired relief. Because the injury here had its genesis in a labor problem which constitutes a minor dispute within the meaning of the RLA, this Court is without jurisdiction to entertain plaintiff's claim. (Pet. App. 14a, *emphasis in original.*)

Thus, the court granted the Santa Fe motion on the basis of a legal argument. The court also summarized the facts of the case *relevant to the motion framed by Santa Fe.* (Pet. App. 8a-11a.) The recitation of facts was therefore quite limited, because the only ground submitted for consideration was the legal argument that since Buell's injuries bore some connection with an actual or potential dispute with his foreman over worksite conditions, FELA recovery for Buell's injuries was precluded.

The facts of this case bearing on the cause, nature and extent of Buell's injuries were not considered relevant by Santa Fe in its summary judgment motion. That motion did not contend that the FELA does not apply to psychiatric or "purely mental" injury. (See Santa Fe Motion, Excerpts, Tab 44—the nature of the injuries suffered by Buell are virtually unmentioned, and Santa Fe Supplemental Memorandum, Excerpts, Tab 49—Buell's injury is clearly insignificant to the Santa Fe argument that injury to a worker which has its genesis in what could be deemed a "minor dispute" under the RLA cannot be the subject of an FELA action.) Due to Santa Fe's choice in framing its motion and argument, Buell did not review the record to establish facts showing that the injury suffered by Buell was not "purely mental," and the trial court understandably accepted the factual assertions of Santa Fe.

Indeed, during the previous deposition of Buell, Santa Fe's counsel had shown no particular interest in what were the threats, intimidation and abuse that Buell had suffered. (See Buell Dep. pages 109-112.) Buell was asked what threats Wright had made against him. (Buell Dep. 109/14.) Buell responded by describing several threats Wright had made to have him fired. (Buell Dep. 109/16-110/2) Buell was then abruptly cut off by Santa Fe's counsel from giving further testimony concerning additional threats of a physical or other nature from Wright. (Buell Dep. 110/1-5.) Santa Fe's counsel returned to the topic of threats, but abandoned the subject in mid-question. (Buell Dep. 112/1 —"What other threats—strike that.") Thereafter Santa Fe's counsel never requested further information on threats Wright made against Buell, apparently feeling that it was the job of Buell's counsel to "get out your [Buell's] side" "when we get to



trial". (Buell Dep. 111/18-19) A few moments later, Santa Fe's counsel walked out of the deposition without ever determining whether all of the threats, intimidation and harassment of Mr. Wright had been described. (Buell Dep. 136/7-12.)

This seemingly careless conduct of Santa Fe counsel was actually consistent with the Santa Fe legal position that the causes and nature of the injuries suffered by Buell were irrelevant once it was established that they had some relationship to a dispute in the workplace that arguably could have been made the subject of a grievance proceeding. Thus, Buell's description of the threats and harassment of foreman Wright was cut off and the deposition questioning changed to the topics of the nature and frequency of the requests by Buell and other carmen for formal union grievance represention to stop Wright's threats and harassment. (See Buell Dep. 129/21-136/14.)

For the Santa Fe summary judgment motion, the only relevant facts were that Buell had protested the workplace orders given by his foreman, Ed Wright, and that Buell had been harassed, threatened and intimidated in the workplace following his protests. Santa Fe's legal position was that once a dispute involving orders of a foreman or other condition of work has arisen, the FELA cannot apply to worker injuries suffered either because of the dispute, the disputed orders of the foreman or any other unsafe working condition. This legal conclusion was premised upon the position that no aspect or consequence of a dispute that was, or could have been made, the subject of a grievance proceeding can be the subject of a claim in any forum other than an RLA grievance proceeding. No one questioned that Buell's injuries had been caused by incidents that occurred in the workplace and involved Buell and fellow workers. Those facts were the only ones of importance for Santa Fe, because of its legal argument. The exact causes, nature and extent of the injuries suffered by Buell were logically never in issue under the theory Santa Fe successfully advanced to the trial court.

The District Court did note that Buell had suffered a mental breakdown requiring 17 days hospitalization in the psychiatric ward at St Joseph's Hospital in Stockton, California. (Pet. App. 9a.) The court also noted that the harassment on the job that

Buell suffered was alleged by him to be the cause of his breakdown. (Opp, App. 9a.) Other than these two items concerning Buell's injury, the court's summary of facts is silent on that topic, and must be extensively supplemented to accurately reflect the factual pre-trial record developed through discovery and motion proceedings. Unless otherwise noted, the following factual summary draws from the District Court opinion, which is highly accurate on the items it addresses. (see Pet. App. 9a-11a.)

Buell, a member of the Brotherhood of Railway Carmen ("union"), began working for Santa Fe as a laborer in the company's railroad yards in 1971. (Buell Dep. page 28.) In September, 1979, while Buell was working as a carman-inspector in the Santa Fe railroad yard in Stockton, Wright was appointed Buell's immediate foreman.

Within a month or two after Wright began his supervisorial duties, he ordered Buell and other carmen to complete railroad car inspection reports in a manner that conflicted with instructions given by Wright's superior, Mr. Messick. This conflict made it difficult for the carmen to satisfy both supervisors, and Buell complained many times to Wright's superior over the next few months in order to get the matter adjusted. (Buell Dep. pages 21-27.) Eventually, Buell stopped making complaints, and adjusted to the conflicting orders as best he could. (Buell Dep. 25/1-15.)

A second set of orders at this time affected Buell individually. Wright would order Buell to help him load Santa Fe property, such as ice and plywood, into a company pickup truck that Wright would then drive home. (Buell Dep. 50-59, 73-75.) Buell, the only carman on his shift, was the only worker that Wright ordered to engage in this activity. (Buell Dep. 51/16-24.) Buell deeply resented being required to assist in what he considered to be Wright's illegal conduct. Buell complained to a Santa Fe supervisor following a meeting concerning worker grievances over Wright's method of work supervision, and Wright thereafter stopped ordering Buell to help in removing company property. (Buell Dep. 50/9-51/13.)

While Buell's complaints about Wright's orders and removal of company property would make Buell a natural target of Wright's



wrath, the foreman apparently chose to threaten, harass and intimidate a number of Buell's co-workers as well. Several carmen, including Buell, complained informally about Wright's abusive supervision without noticeable effect, leading to a formal, written grievance being filed against Wright in early 1981. (Buell Dep. 49/8-50/6.) At a grievance meeting Santa Fe District Supervisor Pichelman heard complaints about Wright's behavior from Buell and other carmen. (Buell Dep. 60.)

The grievance meeting did not end Wright's threats and intimidation, as indicated by a letter to Pichelman dated June 5, 1981, from Peter Brooker, General Chairman of the union. (Excerpts, Tab 42, Exhibit D.) This letter states that the union had received complaints from workers about Wright's abusive behavior occurring after the grievance hearing. These complaints concerned foreman Wright's "ambition to threaten the carmen employee[s] even to the extent of the loss of their jobs." (second paragraph of Exhibit D.) Carmen at the Santa Fe yard in Stockton had made few complaints to the union before Wright's arrival, but the letter states that since he became foreman "an uproar has begun." (Fifth paragraph of Exhibit D.) The writer hopes that Pichelman "will be able to 'get the ice water out of Foreman Wright's veins'" or else higher Santa Fe officials will be called upon "to change the attitude and actions of this supervisor." (Sixth paragraph of Exhibit D.) The letter concludes, " . . . these actions on the part of Foreman Wright have no place in today's operation on this railroad, and it is an absolute necessity that Foreman Wright change his tactics completely."

As noted by the District Court, the partial record developed prior to the Santa Fe motion does not disclose "[w]hat further action, if any, was taken with regard to the complaints about Mr. Wright's conduct . . . " (Pet. App. 10a.) At this point, Buell had done all he could to protest and formally complain about Wright's abusive behavior. As Buell stated at his deposition:

> "What I did is I wrote it up to the union twice, okay, signed statements with some other carmen, what they did with the grievances and who they sent them to I do not know except beyond the fact that Mr. Pichelman was called in to talk with the union. I do not know if they went to any

arbitration board or anything like that." (Buell Dep. 134/26-135/3.)

Buell had individually complained to higher supervisors about certain of Wright's orders, and had joined other carmen in written protests about Wright's abusive conduct. Thus, unless Santa Fe acted to restrain Wright, Buell would be a probable target for Wright to threaten and abuse for retaliation and as a warning to others, following the June 5, 1981 letter. The evidence developed in the exhibits to motion papers and the Buell deposition clearly indicates that, after the apparently unsuccessful grievance protest, Buell received the type of special treatment from Wright and Wright's associates that one would expect to be forthcoming unless Santa Fe took adequate steps to prevent Wright from abusing Buell.

Al Williams, a machinist in the employ of Santa Fe at the Stockton yard, had been friendly with Buell during the past. (Buell Dep. 30/20.) However, the Buell-Williams relationship cooled after Williams became a very close friend of foreman Wright. (Buell Dep. 100/25-101/15.) Certainly it would appear that Williams became an instrument in Wright's abusive treatment of Buell after the grievance meeting.

During this period in which Buell was abused by Wright and Williams, a number of events occurred, aimed at Buell's apparent sensitivity over his weight. First, a cartoon of a large balloon bearing the label "Buell" was posted on the railroad yard bulletin board. (Buell Dep. 89/8 and Excerpts, Tab 42, Exhibit B.) Within two weeks, a second insulting cartoon, showing a hippopotamus wearing bib overalls and labelled "Carman of the Month: Jim Buell" was posted throughout the railroad yard. (Buell Dep. 77/17.) The second cartoon, like the first, was drawn by Al Williams. (Buell Dep. 90/25-91/7.) Shortly after the second cartoon appeared, Buell's timecard was repeatedly tampered with, his name erased and "Porky" written in its place. (Buell Dep. 87/2-88/24.) Buell complained vigorously to Santa Fe about these incidents, but they continued to occur during the period following the grievance meeting. (Buell Dep. 78/23-80/10, 85/10-86/3.)



Following the appearance of the cartoons, an incident of physical assault and battery occurred in which Williams shoved and bumped Buell. (Buell Dep. 101/17-102/24.) Increasing the intensity of the intimidation that Buell suffered during this period, Wright, on one or two occasions, told Buell that he, as foreman, would have Buell fired in a manner that would be beyond union protest. (Buell Dep. 109/14-111/28.) At least one of these threats was aimed at preventing Buell from seeking union assistance following the grievance meeting. (Buell Dep. 109/18-21.)

Within a short time, this collection of incidents resulted in Buell experiencing a "severely psychotic depressive illness," which made it "necessary to hospitalize him." (Excerpts, Tab 44, Exhibit B—letter of Dr. Austin.) The hospitalization occurred on October 13, 1981, and Buell remained in the psychiatric ward of St. Joseph's Hospital in Stockton, under the care of Dr. Robert G. Austin, until October 30. (Excerpts, Tab 44, Exhibit A, Discharge Summary prepared by Dr. Austin.) In the words of Dr. Austin, the episode "represented an acute mental illness which was related to job pressures." (Excerpts, Tab 44, Exhibit C.) Buell was heavily medicated with Triavil 4-25, a potent psychiatric drug, throughout his hospitalization. Dr. Austin felt it necessary for Buell to continue to take large quantities of Triavil until at least the end of March, 1982. (Excerpts, Tab 44, Exhibits A and B.)

As Dr. Austin has recounted, Buell came to St. Joseph's Hospital "in a very paranoid, frightened state." (Excerpts, Tab 44, Exhibit A.) Dr. Austin has written that: "Mr. Buell suffered a severely psychotic depressive illness associated with conflicts at work." (Excerpts, Tab 44, Exhibit B.) Because he was "resistent (*sic*) to some illegal activities by his superiors" Buell felt that he had "been harassed because he failed to go along with these issues." (Excerpts, Tab 44, Exhibit A.) Buell felt that "his life was endangered" because of an "issue revolv[ing] around some behavior by his superiors and peers that he considered illegal." (Excerpts, Tab 44, Exhibit B.) Buell believed that because of his involvement in the issue "his death would be arranged," and Buell's incapacity and disorganization made it necessary for Dr. Austin to hospitalize him. (Excerpts, Tab 44, Exhibit B.)

Dr. Austin further noted in his report in October, 1981:

> "He apparently has carried his complaints to top management and has not been able to resolve the conflict. He felt that his life was increasingly in danger and began doing things like taking a gun to work with him. Finally he became so tearful and depressed and immobilized that he was holding the gun to his own head and came into the hospital in a very paranoid, frightened state." (Excerpts, Tab 44, Exhibit A.)

As a prognosis upon discharge, Dr. Austin stated, "[t]here is no way that he can return to work for the railroad at the present time and it is my projection that he probably will never be able to return to employment there." (Excerpts, Tab 44, Exhibit A.) With medication and psychotherapy, the prognosis for return to work improved by March, 1982. (Excerpts, Tab 44, Exhibit B.) With continued treatment and improvement, Dr. Austin approved Buell's return to work for Santa Fe on October 1, 1982.

At the time of his hospitalization one year before, Buell had complained of gastritis, and x-rays disclosed thickening of duodenal mucosal folds at that time, thus confirming the disorder. (Excerpts, Tab 44, Exhibit A.) The gastritis was the result of Buell's emotional condition at the time of his hospitalization. (Buell Dep. 7/17-8/9.) The stomach condition was a continuing one at the time of Buell's deposition on October 27, 1983 and he was under the treatment of a physician and taking Donitol, a prescription drug for this ailment. (Buell Dep. pages 7 and 11.)

As the trial court was solely concerned with the legal argument framed by Santa Fe, no attention was given to the physical aspects of the harassment (the bumping and shoving by Williams) or the fact that Buell suffered gastritis because of the harassment or his resulting mental breakdown. Indeed, as noted above, the nature of the threats and intimidation by Wright that Buell suffered were not pursued in Buell's deposition by Santa Fe counsel, because Santa Fe's defense rested on the legal proposition that Buell could not state a cause of action under the FELA if his injury had its source in a dispute on the worksite.



Santa Fe developed its legal argument for summary judgment by discussing a number of federal court decisions holding that certain causes of action under state law are preempted by the grievance procedures established by the RLA. For obvious reasons, Santa Fe chose not to use the word "preempted" to describe the effect it argued that the RLA grievance procedures had on FELA created rights. Instead, Santa Fe argued that these preemption decisions established that the Santa Fe-union collective bargaining agreement had a "preclusive" effect upon the right of Buell to seek redress under the FELA. (Excerpts, Tab 42, page 2.)

The District Court, while acknowledging that Buell's injuries "are substantial" (Pet. App. 14a), held that the RLA grievance procedures eliminated any FELA created rights Buell might have, and granted Santa Fe's motion to dismiss. The fact that Buell's principle injury was psychiatric in nature was of no importance to the District Court, as it had been of no importance to Santa Fe in bringing the motion to dismiss.

Before the Ninth Circuit, both parties briefed and argued the issue of whether the District Court had erred in viewing Buell's FELA cause of action as one that had no greater standing in relation to the RLA than a state created right. The Ninth Circuit opinion corrected the District Court's error, noting that the FELA is a federal cause of action and that the law of preemption is not applicable in reconciling the commands of two federal statutes. *Buell v. A.T. & S.F.*, 771 F.2d 1320, 1323-24 (9th Cir. 1985).

The lower court was accordingly reversed and the case remanded for further proceedings. 771 F.2d at 1324. Although the issue had not been briefed, the Ninth Circuit also took the opportunity to announce its considered view that damages resulting from non-physical injuries are recoverable under the FELA. Thus, the court held that a FELA covered employee who suffers such an injury can assert his or her federal statutory right to recover for that injury if it is the result of the employer's negligent or intentional failure to provide for the safety of its workers.

Before this Court, Santa Fe continues to press the argument it made in the lower courts—that due to the existence of grievance

procedures under the RLA, the FELA does not provide recovery for an injury "arising out of a workplace dispute between an employee and his supervisor." (Brief for Petitioner ("Pet. Br."), Argument II, page 25.) Santa Fe apparently concedes that the FELA does provide a cause of action for purely mental injury, because its statement of the "Question Presented" does not question the point and none of the headings or content of its arguments attacks the Ninth Circuit's view. (See Pet. Br. (i)-(iv).) However, Santa Fe argues that the FELA cause of action for recovery for non-physical injury is not available to a railroad worker who suffers such injury arising out of a dispute with his or her supervisor. (Pet. Br. 26-29.)

## SUMMARY OF ARGUMENT

Buell's complaint alleges that Santa Fe acted either negligently or intentionally in allowing foreman Wright, personally and with at least one other co-worker, to cause injury to Buell through a course of harassment, threats and intimidation. This would appear to be a classic FELA cause of action. The fact that Buell could, and did, attempt to stop the abusive treatment he and others were experiencing through a grievance procedure has no apparent relevance to his right to pursue an FELA cause of action in federal court. It also appears irrelevant that Buell argued with his foreman months before he suffered his injury. Finally, since the FELA on its face creates a cause of action for any "injury" a railroad worker suffers as the result of employer negligence, it would seem to make no difference under the FELA that Buell's injuries were primarily psychiatric in nature.

Since the type of injury that Buell suffered was not considered relevant by Santa Fe or the trial court, the record facts in this case are not properly reflected in the opinions of the District Court or the Court of Appeals. Thus, Buell's injuries have been described in both opinions as wholly or purely mental in nature. However, the fully examined facts show that Buell suffered physical injury as well as a severe mental breakdown and that the harassment causing his injuries included physical contact and common law assault. Additionally, the harassment clearly constitutes an intentional infliction of emotional distress.



The facts mentioned in the preceding paragraph logically remove Buell's cause of action from the "purely mental injury" tort category. These facts are now before this Court, and whether the FELA should be interpreted to provide recovery for "purely mental injury" does not have to be decided in this case. Actually, it is an issue that only amici briefs in support of Santa Fe have raised in a direct fashion. However, if this Court wishes to address the question, the language of the FELA, the intent of Congress in passing the statute and the decisions of this Court all compel an interpretation of the Act allowing such a cause of action. Indeed, a contrary holding would truly thwart the intent of Congress in passing the FELA to favor railroad workers with a liberalized remedy for employer-caused injuries. A holding that railroad workers cannot sue for intentional infliction of purely mental injury under the FELA would mean that those workers could *never* recover for such injuries, even in states allowing all other workers to bring such actions in state courts.

Throughout this litigation, Santa Fe has advanced the argument the District Court accepted. That argument is that the "source" of a railroad worker's injury, admittedly suffered in a workplace made unsafe by employer negligence, controls whether the worker can bring an FELA action. If the "source" is either a dispute with a supervisor or results from an unsafe working condition that could have been made the subject of a grievance proceeding, Santa Fe argues that the RLA precludes an FELA action in federal court to recover for the negligently inflicted injury. However, disputes with supervisors over unsafe working conditions are very common and, almost by definition, employee injuries caused by employer negligence invariably involve an unsafe working condition that could have been made the subject of a grievance proceeding. Thus, the Santa Fe argument would eliminate the FELA as a viable federal statute.

## ARGUMENT
## I

## BUELL'S CAUSE OF ACTION UNDER THE FELA IS NOT PRECLUDED BY RLA GRIEVANCE PROCEDURES BECAUSE HIS CAUSE OF ACTION HAS NO CONNECTION WITH THE COLLECTIVE BARGAINING CONTRACT BETWEEN SANTA FE AND THE UNION.

The basic difference between Buell and Santa Fe in this appeal is that Santa Fe describes Buell's "dispute" with it to be an argument over working conditions, meaning either the validity of Wright's orders or the appropriateness of his conduct as a foreman. Buell admits that at one time he had disagreements with his foreman. However, Buell sees the only "dispute" (to use Santa Fe's word) he presently has with Santa Fe as being the cause of action he set out in his Complaint on file in this action. (Jt. App. 6-8.)

Three issues were framed by Buell's complaint: (1) was Santa Fe negligent in failing to provide a safe workplace to Buell, (2) did the negligence result in injury to him, and (3) what is the amount of those damages. Those issues have nothing to do with an RLA "dispute" over the terms of a collective bargaining agreement. The issues of fact raised by Buell's Complaint are classic FELA issues and the resolution of them will not require a judge or a jury to consider, even for the moment, the collective bargaining agreement between Buell's union and Santa Fe.

### A. Santa Fe's Three Preclusion Arguments Are Premised Upon a Misreading of the Facts In the Record of This Case.

Santa Fe makes three different arguments in Petitioner's Brief for the proposition that the procedures established by the RLA preclude Buell from asserting his FELA cause of action.[1] Each of

[1] As noted in Arguments I.C.2. and IV.A. below, Santa Fe apparently acknowledges that a claim for solely mental injury can be validly stated under the FELA. The Santa Fe position seems to be, however, that such an FELA cause of action is precluded when the alleged injury arose "out of a workplace dispute between an employee and his supervisor." (Quoting from the heading of Santa Fe's Argument II, Pet. Br. 25.)

*(Footnotes continued on following page)*



the three Santa Fe arguments ignores three crucial facts: (1) Buell suffered an injury (of a severe nature, in the opinion of his psychiatrist), (2) the conduct that caused Buell's injury and that Santa Fe allowed to take place, occurred months after the disagreements between Buell and Wright, his foreman, over the latter's orders were concluded, and (3) the conduct that caused Buell's injury and that Santa Fe allowed to take place could never be justified on any basis as proper conduct under any provision of the collective bargaining agreement between the union and Santa Fe.

The facts that Santa Fe failed to consider may be contested at the trial of this matter, because these facts are either alleged in Buell's complaint, found in his deposition or stated in letters written by his treating psychiatrist. However, on appeal from the granting of a summary judgment, the record should be regarded "... in the light most favorable to ... the party opposing the motion ..." *Poller v. Columbia Broadcasting Sys. Inc.*, 368 U.S. 464, 473 (1962) and see Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d, section 2716 (1983).

The reason that the District Court and Ninth Circuit opinions do not examine the facts supporting Buell's complaint allegations have been discussed in the Statement of Facts. In brief, those reasons are (1) Santa Fe framed its summary judgment motion solely on a point of law, and (2) the point of law did not involve any contested facts. That point of law was that Buell's injury was a "minor labor dispute" under the RLA because the "source" of injury was Buell's employment relationship with Santa Fe. (See Excerpts, Tab 42, page 13—Santa Fe's Motion and Pet. App. 14a—District Court opinion.) Neither the parties nor the two lower courts considered the facts developed in the partial record as important because it was undisputed that Buell's injuries were connected to his employment with Santa Fe.

Thus, if a worker suffered a common law assault at the hands of another worker in which the second worker had swung an ax at the plaintiff, and there had been no "dispute" between the plaintiff and Santa Fe of any type prior to the common law assault, it would seem that an FELA cause of action could be stated by the plaintiff to seek recovery of damages for emotional injury, and Santa Fe would not object.

The facts contained in the record establish that Buell sustained a severe injury ("a psychotic illness"), which was related to his workplace at Santa Fe's Stockton yard. The facts also show that Buell's employment under Wright's supervision should be viewed as consisting of three chronological periods. The first begins with Wright's becoming Buell's foreman in October, 1979 and continues through the resolution of Buell's complaints concerning Wright's orders on the car inspection reports and the removal of company property. Through complaints to supervisors, Buell managed to make Wright cease giving the latter orders. On the car inspection orders Buell eventually acquiesced as best he could.

During the second period, beginning with the resolution of the disputes over Wright's specific orders and lasting through the grievance meeting held with Mr. Pichelman, Buell and other workers protested Wright's abusive and threatening tactics as a foreman. The Pichelman meeting, sometime before June, 1981, produced an unknown result. However, during the third period under consideration it is clear that the abuse of Buell escalated as he received special treatment from Wright and Wright's friend, Williams. This period begins after the Pichelman meeting and continues until Buell is driven to the psychiatric ward at St. Joseph's Hospital in Stockton. During this period Buell is made the subject of continued harassment in the form of cartoons depicting him in a gross and insulting manner posted throughout the workplace area, continued degrading alterations of Buell's timecard, one act of physical battery with the implication of further physical consequences, at least one threat by his supervisor to fire him illegally because of Buell's past complaints to his union, and possible other threats from Wright on which Santa Fe chose not to question Buell.

The conduct of Wright and his friend Williams during the third period was the precipitating or proximate cause of Buell's unfortunate mental breakdown in which Buell feared for his life to the extent of carrying a gun to the Santa Fe yard. This third period "special treatment" of Buell was not part of Buell's disputes over Wright's orders during the first period of Wright's foremanship. Those disputes had long since been resolved. Also, the third period special treatment was not part of the general protest heard



in the Pichelman grievance proceeding. That matter was presented by the union weeks before, and we do not know how the Santa Fe management dealt with the grievance after the June, 1981 union letter again protesting Wright's conduct.

It is also clear that the third period special treatment Buell received could not be justified by any provision in the Santa Fe-union contract. A calculated campaign of threats, degradation and ridicule is not a conceivable method of "discipline" or an arguably acceptable working condition under any such collective bargaining agreement.

While Santa Fe will undoubtedly claim that it took reasonable steps to stop the third period special treatment, it is clear that the treatment continued until Buell's mental breakdown resulted. However, the question of whether Santa Fe took reasonable steps to stop the threats, degradation and ridicule is one that should be tried upon remand. Santa Fe's conduct in allowing the special treatment to occur over the third period will determine whether Santa Fe was negligent in allowing emotional distress to be intentionally inflicted upon Buell by a vindictive foreman and his colleague. If Santa Fe was negligent in not stopping the conduct, its liability under the FELA is clear. 32 Am. Jur. 2d, Federal Employers' Liability and Compensation Acts, section 25.

Three different RLA preclusion arguments are presented by Santa Fe. First, the RLA grievance procedures preclude the application of the FELA to any aspect of a situation that could have been made the subject of an RLA grievance claim. (Pet. Br. Argument I, pages 10-25.) Second, RLA grievance procedures preclude the application of the FELA to any aspect of a situation in which a worker has argued with his supervisor in the workplace. (Pet. Br. Argument II, pages 25-27.) Third, RLA grievance procedures preclude the application of the FELA to claims for emotional injury suffered by workers as the result of arguments with their supervisors. (Pet. Br., pages 27-30.)

All of the three Santa Fe preclusion arguments overlook the crucial importance of the fact that Buell suffered an injury allegedly attributable to Santa Fe's negligence. With that fact, the

FELA, a federal statute like the RLA, becomes applicable by its terms. All three of the Santa Fe arguments also overlook the fact that during the third period during which Buell endured the special treatment that resulted in his injury, Buell no longer had a "dispute" with Wright or Santa Fe relating to anything under the Santa Fe-union collective bargaining agreement. During the third period, the past disputes with Wright over his orders had long since been resolved. Also during the third period the general controversy between Wright and those workers under him was being considered by the Santa Fe management following the Pichelman grievance meeting. Thus, Wright's general tactics as foreman were not an issue.

On the other hand, Wright's special treatment of Buell during the third period (accomplished in part through the acts of his friend Williams) appears to be merely vindictive punishment of Buell and cannot be justified under any provision of the collective bargaining agreement. Thus, three additional critical facts of this are ignored in the three Santa Fe preclusion arguments: (1) the conduct of Wright and his colleagues that Buell complaints occurred *after* the legitimate "grievances" he had with Santa Fe had been concluded or taken out of his hands, (2) the conduct could not be justified under any provision in the collective bargaining agreement, and (3) the conduct bore no rational relationship to any past dispute over working conditions between Buell and Wright, but appears to have been merely vindictive mistreatment designed to punish Buell.

**B. Two of Santa Fe's Three Preclusion Arguments Would Eliminate the FELA as a Viable Statute and Should Be Rejected Without Extended Discussion.**

The first Santa Fe argument is that RLA procedures preclude the assertion of an FELA claim if the "source" of the claim is or was a grievable dispute. (Pet. Br., Argument I.A.) The second argument is that RLA procedures preclude the assertion of an FELA claim if the "source" of the claim was a dispute with a foreman over working conditions. (Pet. Br., Arguments I.B. and II., through page 26.) Under Argument I.C. in Petitioner's Brief, the preclusive effect of the RLA procedures upon an FELA cause of action is total, under either of the two arguments.



These arguments purport to cover *all* FELA tort claims. Thus, if Wright had brought a knife to the worksite and stabbed Buell, these Santa Fe arguments would purportedly apply and an FELA cause of action would be precluded. Also, "working conditions," if covered by a collective bargaining agreement, can be the subject of a grievance proceeding under 45 U.S.C. section 151(a)(5). Thus, if a grievance could have been filed to protest the working condition of inadequate lighting in the railyard, under the first Santa Fe preclusion argument, a worker who lost a leg because he could not see an approaching railcar due to such inadequate lighting, could not pursue an FELA claim for recovery.

Under the second Santa Fe preclusion argument, the FELA would also be virtually eliminated as a statute. If a worker complained to a supervisor about mistreatment or about inadequate lighting in the railyard, the worker would be precluded from seeking relief under the FELA for a subsequent stabbing or loss of a leg.

In *Lancaster v. Norfolk and Western Railway Company*, 773 F.2d 807 (7th Cir. 1985), essentially the same argument was presented by the railroad to the court. The Seventh Circuit noted that if such a broad RLA "preclusion" theory were adopted, railroad workers would lose any right to bring personal injury actions under the FELA and would have to look exclusively to relief from RLA arbitration procedures. The court concluded that "no one" believes Congress intended such a drastic consequence from the passage of the RLA. (773 F.2d 807, 814.)

Santa Fe bases its preclusion arguments on dictum in *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945) in which certain language in the RLA (45 U.S.C. section 153 First (i)) was said to give RLA arbitration panels not only jurisdiction to hear disputes based upon interpretations of the collective bargaining agreement (so-called "minor disputes"), but also "claim[s] . . . founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g. claims on account of personal injuries." See Pet. Br. 11-15, with the quotation from *Elgin*, (325 U.S. at 723) at Pet. Br. 14. However, subsequent decisions have held that RLA boards only have jurisdiction to hear "minor disputes," meaning

disputes involving grievances over the " 'meaning or proper application of a particular provision' in a collective bargaining agreement . . . " *Buell v. A.T. & S.F.*, 771 F.2d 1320, 1323, n. 1 (9th Cir. 1985), quoting *International Association of Machinists & Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir. 1985) and *Air Line Pilots Association v. Texas International Airlines*, 656 F.2d 16, 20 n.6 (2d Cir. 1981). Indeed, if the exclusive jurisdiction of RLA boards were as broad as the *Elgin* dictum, *no* federal or state statutory rights that railroad workers enjoy, including the right to be free of racial discrimination in the workplace, could survive.

The conclusive answer to Santa Fe's preclusion arguments would seem to have been put forth by the Seventh Circuit in the *Lancaster* opinion of last year in which that court examined the *Elgin* dictum and the railroad's claim that RLA boards had exclusive jurisdiction to hear not only minor disputes over the meaning and application of the collective bargaining agreement, but also "grievances" of any type, including personal injuries:

> But later cases make clear that a grievance is a dispute over rights created by the collective bargaining agreement. See, e.g., *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, supra, 353 U.S. at 33, 77 S.Ct. at 636; *Chicago & Northwestern Transport Co. v. United Transportation Union*, 656 F.2d 274, 278 (7th Cir. 1981); *Atchison, Topeka & San a Fe Ry. v. United Transportation Union*, 734 F.2d 317, 32. (7th Cir. 1984); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1059 (the Cir. 1983) (dissenting opinion). The Supreme Court has not repeated the dictum of the *Burley* case. If that dictum were an accurate statement of the law, the Railway Labor Act would have repealed the FELA, and all personal injury claims by railroad workers against their employers would be within the exclusive jurisdiction of the arbitration tribunals set up under the Railway Labor Act—*something no one believes.* (773 F.2d at 814, *emphasis added.*)

That RLA procedures should not preclude the application of the FELA is not surprising given the intention of Congress in passing the RLA. Congress intended to bring peace to troubled



railroad labor relations through a comprehensive statutory framework for the resolution of differences that would otherwise lead to strikes and shut downs of the nation's rail system. *Elgin, Joliet & Eastern Ry. Co. v. Burley*, supra, 325 U.S. at 725-728; *O'Donnell v. Wein Air Alaska, Inc.*, 551 F.2d 1141, 1145-46 (1977); *Yawn v. Southern Ry. Co.*, 591 F.2d 312, 314 (1979). The statute provided mechanisms for resolving "major disputes" (meaning differences over what the terms of a railroad-union collective bargaining contract *should* include) and "minor disputes" (meaning differences over the interpretation and application of the terms of a previously negotiated collective bargaining agreement). Since the RLA was enacted in 1926 and amended in 1934 in order to achieve peaceful railroad labor relations, it is not surprising that courts have not held that such a statute "precludes" the operation of the 1908 FELA. The latter Act was intended to solve the problem of providing fair compensation for workers injured due to railroad negligence, a subject wholly unrelated to labor strikes. Thus, the *Elgin* dictum has been disregarded because it does not accord with Congressional intent.[2]

Santa Fe also cited many decisions to the District Court and Ninth Circuit involving the preemption of state common law causes of action by the RLA grievance procedures. The District Court accepted these decisions as controlling, but the Ninth Circuit more properly determined that these decisions have no relevance to the issue of whether the RLA precluded the operation of the FELA, a federal statute. 771 F.2d at 1323-24. The preemption decisions Santa Fe persists on citing involve a railroad worker's suit for wrongful discharge, a state common law cause of

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[2] Buell is informed that amicus AFL-CIO will file a brief supporting his position. That brief, among other things, develops a second reason for the rejection of the *Elgin* dictum by subsequent courts. The *Elgin* opinion was premised upon the idea that RLA grievance procedures were not exclusive, but merely one option that a worker might wish to pursue. As the grievance procedures were not considered exclusive, an expansive notion of the possible jurisdiction for RLA boards had little significance. However, the law has long since been settled on the point that RLA grievance procedures *are* exclusive and the *Elgin* dictum has accordingly been disregarded.

action. The worker usually seeks, among other things, damages for emotional injury in a state court action. Invariably, the worker's collective bargaining agreement provides protection against arbitrary discharge; and the decisions hold that the RLA preempts the state cause of action and the worker must seek relief through RLA grievance procedures. See *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 321-22 (1972); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978); *Landfried v. Terminal R.R. Ass'n*, 721 F.2d 254 (8th Cir. 1983), cert. denied, 466 U.S. 928 (1984); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984). As the Ninth Circuit held, these decisions are of no relevance to a reconciliation of two federal statutes, and should be disregarded.[3] Not surprisingly, the only other reported Circuit Court decision on the issue of RLA preclusion of the FELA held that no such preclusion is possible in view of the fact that the FELA is a federal statute. *Hendley v. Central of Georgia Ry.*, 609 F.2d 1146, 1152-53 (5th Cir. 1980) and see *Yawn v. Southern Railway Co.*, 591 F.2d 312 (5th Cir. 1979).

Santa Fe's citations to preemption decisions also may obscure the proper focus of a court's concern in any interpretation or

[3] Buell believes that amici Public Citizen and Teamsters for a Democratic Union will file an amicus brief in this proceeding. The position taken in that brief, as understood by Buell, is that the RLA does not preempt a worker's state law causes of action that are not dependent upon the existence of the collective bargaining agreement between the employer and the worker's union. While the argument is sound, Buell submits that the issue of RLA preemption of state law causes of action is not before the Court in this case, as Buell's claim, which is in no way dependent upon the existence of the Santa Fe-union collective bargaining agreement, arises under the FELA. Thus, Buell agrees with what he understands is the ultimate position of amici Public Citizen and Teamsters for a Democratic Union—that this case is not an appropriate occasion for the Court to address the complex "disarray [in] the case law on the displacement of [state] tort law by the Railway Labor Act." *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1061 (7th Cir. 1983) (Posner, J. dissenting).



application of the FELA. That focus must always be workplace safety for railroad workers. The state cause of action preemption cases do not, of course, concern safety in the workplace for the reason that the FELA would preempt such a state cause of action. Only one of the preemption decisions cited by Santa Fe before the lower courts, *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 297 (1977) should perhaps be considered in this action. However, *Farmer* is useful solely for purposes of analogy having nothing to do with the general Santa Fe preclusion arguments. The *Farmer* decision is discussed in Argument I.C.2.c., below.

If either of Santa Fe's general preclusion arguments is adopted, the terms of a railroad-union collective bargaining agreement would have the effect of precluding an injured railroad worker's right to bring suit under the FELA. Grievance procedures can only be invoked when a question of interpretation of the terms of such a contract arises, and under the Santa Fe arguments, the preclusive effect of the RLA would be triggered by the existence of a term in the agreement that arguably applies to a worker's injury.[4] This would directly flout section 5 of the FELA (45 U.S.C. section 55) which voids any contract "or device whatsoever" that would exempt a railroad from its full liability under the FELA. The section has been held to prohibit the application of any contract provision that materially affects an injured railroad employee's right to sue in federal court. *Boyd v. Grand Trunk Western Railroad Company*, 338 U.S. 263, 265 (1949) and see *Wilko v. Swan*, 346 U.S. 427, 437 (1953). Thus, Congress specifically prohibited the result Santa Fe seeks to achieve with its preclusion arguments.

Finally, on the general question of RLA preclusion of an FELA cause of action, this Court, in an unbroken line of decisions discussed below, has established a directly controlling principle. The principle is that if Congress has chosen to convey causes of action upon individual workers to be enforced in federal court,

[4] Santa Fe actually makes such an attempt to show that the Santa Fe-union agreement included a term that "arguably governed" Buell's injury, at Pet. Br. 18.

those causes of action cannot be precluded or in any way diminished by the existence of a federally created or authorized arbitration procedure designed to settle labor management disputes. See discussion of *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1951), *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1980), *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1973), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984) in Argument I.C,2., supra.

### C. Santa Fe's Third Preclusion Argument, That RLA Procedures Preclude an FELA Cause of Action When a Worker Seeks Recovery for Only Psychiatric Injury Suffered as the Result of a Grievable Dispute, Is Generally Invalid and Has No Application to Buell's FELA Cause of Action in Any Event.

#### 1. Buell's FELA cause of action is not for "purely emotional injury"; thus, Santa Fe's third preclusion argument does not apply to the facts of this case.

Santa Fe's third preclusion argument is that RLA procedures preclude a worker's assertion of an FELA cause of action for psychiatric injury when that is the only injury arising out of a workplace dispute between the worker and his supervisor. Apparently, the argument is of little concern to Santa Fe, as it devotes only two pages to presenting it and does not include any reference to it in the preceding argument heading. (See Pet. Br. 27-29, and the statement of Argument II on page 25.) The authorities cited by Santa Fe also indicate its lack of interest in the argument as well as the weakness of this position: two unreported decisions,[5] misdescribed dictum from *Lancaster v. Norfolk and Western Ry.*

[5] *Adkins v. Chesapeake & O. Ry. Co.*, No. 85-1204 (4th Cir. 1985), unpublished decision found at Pet. App. 16a-17a, and *Antalek v. Norfolk and Western Ry. Co.*, No. 84-3057 (6th Cir. 1984), unpublished decision found at Pet. App. 22a-24a. These decisions are mentioned at Pet. Br. 27.



*Co.*,[6] and four state cause of action preemption decisions that do not involve the issue of workplace safety.[7]

For the reasons described in Argument III, below, Buell's injuries cannot be described as solely psychiatric or "wholly mental," contrary to the Santa Fe quotation from the Ninth Circuit opinion in footnote 30 on page 28 of Petitioner's Brief. The partial record of pre-trial discovery shows that Buell suffered physical contact in the course of the threats and harassment he endured. He also suffered physical harm in the form of gastritis as the result of this treatment. The mistaken belief of the Ninth Circuit that there was no physical contact or injury is solely the product of the manner in which Santa Fe framed its legal argument to the District Court. Thus, Santa Fe's third RLA

[6] A passage from the *Lancaster* decision is quoted in footnote 29 on Pet. Br. 27 as being the holding of the decision, ~~which is in~~accurate. The statement that the FELA does not create a cause of action for "tortious harms brought about by acts that lack any physical contact or threat of physical contact" is clearly dictum in a decision that holds that an FELA cause of action was stated by a worker who suffered mental injury as the result of a common law assault. The *Lancaster* dictum appears at 773 F.2d at 815, and the *Lancaster* decision is discussed below in Arguments I.C.2.c. and IV, below.

[7] The four preemption decisions are cited in the text and in footnote 30 at Pet. Br. 28. None of the decisions involves workplace safety, which was the explicit concern of Congress in passing the FELA. *Landfried v. Terminal R.R. Ass'n.*, 721 F.2d 254 (8th Cir. 1983), cert. denied, 466 U.S. 928 (1984) involved a state cause of action for retaliatory discharge with no alleged events occurring in the workplace. *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984) also involved a state cause of action for wrongful discharge. *Forgione v. United States*, 202 F.2d 249 (3rd Cir. 1953), cert. denied, 345 U.S. 966 (1953) involved a claim of false arrest and imprisonment away from the jobsite. *McSorely v. Consolidated Rail Corp.*, 581 F. Supp. 642 (S.D.N.Y. 1984) involved a claim of false arrest and malicious prosecution. Santa Fe also cites a fifth decision in the footnote, *Yawn v. Southern Ry. Co.*, 591 F.2d 312 (5th Cir. 1979), cert. denied, 442 U.S. 934 (1979). *Yawn* involved an FELA action brought in state court. The Fifth Circuit held that the RLA did *not* preclude the FELA action.

preclusion argument does not address the facts of this case and should in no way affect Buell's right to seek recovery under the FELA. Nonetheless, the third Santa Fe argument deserves an answer, although the argument is an academic one at this point in the case.

**2. Even if the facts in this case supported the assertion that Buell suffered "wholly mental injury," he would still be entitled to bring an FELA cause of action to recover for such injury under one of three applicable theories.**

The exact nature of Santa Fe's third RLA preclusion argument should be noted, because two important points in the orderly development of the argument in this matter flow from an understanding of Santa Fe's position. Santa Fe does not appear to argue that the FELA cannot apply, under any circumstance, to purely mental injury. Santa Fe's position is only that FELA causes of action for purely mental injury are precluded by RLA procedures *if* the mental injury arises "directly out of disputes with [the worker's] supervisors," or arises "out of the employment relationship." (Pet. Br. 27 and 29.)

Santa Fe apparently acknowledges that purely mental injury involving no dispute with a foreman or any other personal relationship between the injured worker and a co-worker would be an "injury" for purposes of section 1 of the FELA (45 U.S.C. § 51). Consider a railroad worker who suffers a severe mental injury because he was narrowly missed by a railroad car that was negligently operated. If the worker had not disputed any working condition with his foreman and had no personal argument or involvement with anyone connected with the operation of the railroad car, Santa Fe would appear to admit that the worker would have an FELA cause of action for that injury.

The first observation that flows from an understanding of the Santa Fe argument is that it is unnecessary for Buell to argue the basic proposition that the FELA does provide a cause of action for purely mental injury, in order to meet Santa Fe's third RLA



preclusion argument.[8] This materially simplifies the logical development of the issues raised by Santa Fe and the amici filing briefs in its support. The second point is that, due to its limited scope, Santa Fe's third RLA preclusion argument has a surface plausibility that the first two preclusion arguments lacked. Whereas the first two arguments would have eliminated the FELA as a viable statute, the third argument would affect a far smaller number of FELA claims. However, this argument of Santa Fe's must also be rejected because it is based upon misconceptions of the scope of both the RLA and the FELA.

It appears this Court has three available options in resolving the issue of the compatibility of the RLA and the FELA in situations in which a railroad worker claims mental injury as the sole result of facts such as are contained in the record. Under any of the three, Buell is entitled to pursue his FELA cause of action without RLA "preclusion." The first option is preferable, as it cleanly avoids any conflict, real or imagined, between the RLA and the FELA. The second option is the next most preferable because it reflects this Court's history of giving primacy to statutes that create causes of action for individual citizens when reconciling the terms of two federal acts. The third option is least preferred because it is less certain in application and does not accord the FELA proper standing as a federal act. However, even the third option is supported by decisions of this Court and would certainly produce a just result in this case.

**a. The Ninth Circuit correctly determined that Buell's claim is not a "minor dispute" under the RLA.**

The Ninth Circuit correctly determined that the RLA could not preclude Buell from stating his claim as a cause of action under the FELA because the RLA does not apply to his claim. 771 F.2d at 1323-24. The RLA can apply to Buell's claim *only* if his claim can be deemed a "minor dispute" and therefore within

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[8] However, in Argument IV, supra, Buell does make that basic argument because it has been raised by amici Association of American Railroads and National Association of Railroad Trial Counsel ("Associations") in their brief in support of Santa Fe.

the exclusive jurisdiction of the National Railroad Adjustment Board. *See* 45 U.S.C. § 153, First (i). As discussed above in Argument I.B., a "minor dispute" is one over the meaning or application of a particular provision in the collective bargaining agreement. Buell's claim, on the other hand, as held by the Ninth Circuit " . . . is neither related to the collective bargaining agreement nor arguably governed by its provisions." 771 F.2d at 1323.

Santa Fe makes no real argument that Buell's claim is governed or arguably related to the collective bargaining agreement, except to assert that Buell's claim may have some relationship to "Rule 40" of the collective bargaining agreement. (Pet. Br. 18.) That Rule sets out the general guidelines for an investigation to determine if discipline should be given to an employee. What relationship such a rule has to Buell's claim of abusive special treatment during the third period of his service under foreman Wright and his resulting injury is not explained by Santa Fe. Likewise, Santa Fe also states that Buell's "dispute" involved conflicting orders, a subject with which adjustment boards have some experience. (Pet. Br. 18-19.) However, Buell's protests over the conflicting orders had ended and the controversy had been resolved long before the period of abusive special treatment began. Sants Fe also attempts to bolster its position by quoting the thoroughly disregarded dictum from the *Elgin, Joliet & Eastern Ry. v. Burley* decision. (Pet. Br. 19.) This decision, the specific language quoted by Santa Fe, and the reason that the Santa Fe argument has been rejected by all courts are discussed in Argument I.B., above.

Finally, Santa Fe once again cites the state cause of action preemption decisions as establishing that Buell's claim is a minor dispute. (Pet. Br. 17.) However, as the Ninth Circuit pointed out, "[i]n each of these cases, a collective bargaining agreement between the railroad and the employee's union protected the employee from wrongful discharge." 771 F.2d at 1323. Unless the collective bargaining agreement contains a provision that applies to the complaint of an employee, that complaint cannot be considered a "minor dispute." 771 F.2d at 1323. The test to be applied in a close case is whether a resolution of the worker's



complaint will necessarily involve an "interpretation or application of the collective bargaining agreement." 771 F.2d at 1323-24.

Applying the "minor dispute" test to the facts in the record is instructive. There is no need for a court to refer to the collective bargaining agreement to determine (1) whether Buell received the special treatment he alleges, (2) whether Santa Fe was negligent in not preventing or stopping the special treatment, (3) whether that treatment caused his injuries, and (4) what the proper amount of compensation for those injuries should be. Certainly Rule 40, cited by Santa Fe, does not bear upon any of those issues.

**b. Even if Buell's cause of action under the FELA could be deemed to be a "minor dispute" under the RLA, an FELA cause of action cannot be precluded by RLA procedures.**

The preemption decisions cited by Santa Fe do not establish that RLA procedures can preclude the operation of any federal statute, much less the FELA, which provides a cause of action to an individual worker. The FELA is a precise statute, and is far more specific in intent than the RLA. The latter Act was designed to establish a procedural framework for resolution of labor-management issues through the collective bargaining process. For these reasons, an unbroken line of decisions of this Court makes it clear that the RLA cannot preclude the assertion of *any* FELA cause of action, regardless of whether the FELA injury alleged is solely psychiatric in nature.

This Court has repeatedly held that an employee has the right to enforce a specific federal statutory right in a District Court action regardless of any requirements to submit the dispute to a grievance procedure pursuant to a labor-management contract entered into pursuant to a federal statute. In *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1951), the Court held that the specific right of the plaintiff under the RLA to have non-discriminatory representation by bargaining agents could be enforced in a federal court regardless of the existence of a bargaining agreement and the National Railway Adjustment Board procedure. *See* 343 U.S. at 773-774.

A more complete discussion of the point is provided in *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728 (1980), in which the Court held that an employee's specific rights granted by the Federal Fair Labor Standards Act ("FLSA") could not be affected by submission of the dispute in question to a grievance proceeding pursuant to a collective bargaining agreement. Conceptually, the Court noted that Congress gave rights to individual workers in the FLSA, while the collective bargaining contract was authorized by the general Labor Management Relations Act, under which Congress gave rights to unions. There was no reason to assume that Congress intended to restrict federally insured individual worker rights by passing a law encouraging collective bargaining and the establishment of grievance procedures. 450 U.S. at 739-741. Grievance procedures were viewed as inadequate for enforcement of federally-specified individual worker rights because (1) a union may not vigorously represent the worker in the grievance proceeding, and (2) arbitrators may not be conversant with specific federal law protections for workers. 450 U.S. at 742-745. To the same effect is *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1973), in which the Court held that an employee's specific rights under Title VII of the Civil Rights Act of 1964 could be enforced in federal court regardless of a prior arbitration of the dispute under the terms of a collective bargaining agreement.

Finally, the unanimous decision in *McDonald v. City of West Branch,* 466 U.S. 284 (1984), lays to rest any doubt that arbitration procedures are an acceptable substitute for an individual's assertion of a Congressionally conferred cause of action. Holding that a valid arbitration proceeding authorized under a collective bargaining agreement can never preclude a subsequent assertion of an individual's cause of action under 42 U.S.C. §1983, this Court reaffirmed *Alexander* and *Barrantine* and stated four reasons why arbitration is an inadequate substitute for the protection of an individual's rights in a federal court action. *See* 466 U.S. at 290-292. These considerations apply with equal vigor in considering whether an RLA arbitration proceeding would be adequate to protect Buell's right to a safe workplace.



First, RLA arbitrators know the collective bargaining agreement and shop practice, but do not have a federal judge's familiarity with either the general law of torts or FELA jurisprudence. Second, an arbitrator lacks the authority to enforce an FELA cause of action alleging mental injury, because, as noted by the Ninth Circuit, the adjustment board "may not order damages for emotional injury." 771 F.2d at 1323—citing *Sharkey v. Penn Central Transportation Co.,* 493 F.2d 685 (2d Cir. 1974). Third, the worker's union, and not the individual, controls the presentation of the grievance and the conduct of the arbitral proceedings. Finally, arbitrations lack the factfinding safeguards of a federal trial, such as a complete record, the federal rules of evidence, pre-trial discovery proceedings, right of cross examination and compelled testimony.

**c. Even if an FELA cause of action could be precluded by RLA procedures, Buell's cause of action has no substantial relationship to the Union-Santa Fe collective bargaining agreement and, therefore, cannot be precluded.**

Assuming that RLA preclusion of an FELA cause of action was permissible, a third option is suggested by Justice Posner's opinion in *Lancaster v. Norfolk and Western Ry. Co.,* 773 F.2d 807 (1985). The option uses decisions of this Court as analogies for a resolution of the question of whether to allow a FELA cause of action in a situation in which it is arguable that an RLA grievance proceeding could adequately address the particular claim of the railroad worker.[9] In *Lancaster,* the court held that a railroad worker was entitled to recover under the FELA for purely mental injury produced by a common law assault that put the worker in fear of offensive contact. The decision makes four interesting points of law that are relevant to the case at bar. Two

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[9] It is, of course, Buell's basic position that an RLA grievance proceeding could not properly address his FELA cause of action for several reasons, including the fact, as noted by the Ninth Circuit, that RLA arbitrators cannot award damages for mental injury. *See* 771 F.2d at 1323, and *Sharkey v. Penn Central Transportation Co.,* 493 F.2d 685 (2d Cir. 1974).

of those points are incorrect in Buell's view, and two are either correct or at least helpful to a resolution of the issues in this proceeding.

The first of the two statements Buell considers incorrect is an inadequately considered dictum, in which the court appears to state that the FELA does not provide a cause of action for torts that have no physical component, either in causation or consequence. *See* 773 F.2d at 815. This dictum is addressed and put in proper context in the discussion of nonphysical torts under the FELA in Argument IV, below. The second erroneous statement in *Lancaster* asserts that the scope of federal law preemption by the RLA and the reconciliation of any conflicting application of the RLA and the FELA "should be decided consistently." 773 F.2d at 813. The decisions of this Court, such as *McDonald* and *Barrentine*, discussed in Argument I.C.3.b., establish that preemption of state causes of action and preclusion of a federal statute giving rights to individual workers must be treated differently. Those decisions also hold that preclusion will always be rejected if Congress' desire to protect individuals through federal court proceedings would be compromised.

The two points from *Lancaster* that are helpful in addressing the issues in this litigation concern the use of decisions of this Court involving preemption of state causes of action by National Labor Relations Act ("NLRA") procedures. The first point is that the preemptive force of the NLRA is the same as that of the RLA, due to the fact that bargaining agreements under the former statute invariably establish mandatory grievance and arbitration procedures that become exclusive under section 301 of the Taft-Hartly Act, 29 U.S.C. § 185, in the same manner as the arbitral remedies under the RLA. 773 F.2d at 816-17.

Second, *Lancaster* adopts the thinking of this Court in *Farmer v. Carpenters*, 430 U.S. 290 (1977), to resolve questions of RLA preclusion of FELA causes of action. *Farmer* dealt with NLRA preemption of a California state cause of action for intentional infliction of emotional distress, and *Lancaster* used the preemption test first announced by this Court in that case as a guide to determine if the RLA precluded a cause of action for emotional injury. 773 F.2d at 816-17.



*Farmer* held that a state tort is preempted by the NLRA unless the tort was "either unrelated to employment discrimination (which would be the putative subject of an NLRA grievance proceeding addressing the worker's complaint) or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." 430 U.S. at 305. As a practical matter, this Court adopted a "focus" test to determine if the plaintiff's cause of action was substantially unrelated to the matter of federal concern. Thus, if the focus of the evidence supporting the plaintiff's state cause of action was the same as the focus of the evidence in a grievance proceeding on a complaint of employment discrimination, preemption should follow.

In the words used by this Court:

> The evidence supporting the verdict in Hill's favor focuses less on the alleged campaign of harassment, public ridicule, and verbal abuse, than on the discriminatory refusal to dispatch him to any but the briefest and least desirable jobs; and no appropriate instruction distinguishing the two categories of evidence was given to the jury. The consequent risk that the jury verdict represented damages for employment discrimination rather than for instances of intentional infliction of emotional distress precludes reinstatement of the judgment of the Superior Court. 430 U.S. at 306-07, *footnotes omitted.*

Applying the teaching of *Farmer* to the facts in this case, the evidence of the abusive special treatment that Buell suffered and the nature and extent of his injuries would have nothing to do with the terms of the Santa Fe-union agreement, and the terms of that agreement constitute the only proper subject of an RLA grievance proceeding.

The application of the *Farmer* concept to Buell's cause of action becomes more certain when this Court's recent decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. ____, 105 S.Ct. 1904, 85 L.Ed. 2d 206 (1985), is considered. The specific issue in *Allis-Chalmers* was whether a state cause of action for bad faith delay in making a payment of insurance proceeds was preempted by

NLRA grievance procedures that could have been used to enforce the contract of insurance. Thus, the preemption concern was identical to the issue of RLA preclusion, since the latter could only apply when the railroad-union bargaining agreement is applicable. This Court's test in *Allis-Chalmers* requires preemption only when the resolution of the state cause of action is substantially dependent upon an analysis of the terms of the collective bargaining agreement. As this Court stated:

> We . . . hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated [as prescribed in the NLRA] or dismissed as pre-empted by federal labor-contract law. 471 U.S. ____, 105 S.Ct. at 1916, 85 L.Ed.2d at 221.

Using the *Farmer-Allis-Chalmers* test as an analogy in the fashion of the *Lancaster* opinion leads to the conclusion that Buell's FELA cause of action is not precluded. The resolution of Buell's claim has nothing to do with any term in the Santa Fe-union contract, and the abusive treatment Buell received cannot be justified on the basis that it constitutes proper discipline. There will consequently be no risk that an FELA court will be involved in resolving any questions of interpretation of the collective bargaining agreement in entertaining Buell's cause of action.

## II

## THE RECORD WAS NOT DEVELOPED FOR A CONSIDERATION OF WHETHER THE FELA PROVIDES FOR RECOVERY FOR PSYCHIATRIC OR MENTAL INJURY, AND IS, THEREFORE, INADEQUATE FOR A CONSIDERATION OF THAT ISSUE.

As noted in the Statement of the Case above, Santa Fe moved for summary judgment on the sole ground that Buell's cause of action had its genesis in a dispute over conditions in the workplace provided for him by Santa Fe. The type of injury suffered by Buell was completely irrelevant to the argument made by Santa Fe, for that argument would be applicable to *any* injury, physical or mental, resulting from a condition that could have been made



the subject of a grievance proceeding. Thus, if Buell had lost a leg because the lighting in the railroad yard was inadequate to see that a train was moving, under the Santa Fe argument Buell could not state an FELA cause of action because the condition (poor lighting) could have been made the subject of a grievance proceeding. The same preclusion of an FELA cause of action would have followed, under the Santa Fe argument, if Buell had an argument with Wright over one of the latter's orders, Wright brooded over the argument for a number of months and then stabbed Buell severely with a large knife.

Buell, then and now, has no reason to deny that he protested Wright's orders and, together with many other workmen, protested Wright's generally abusive supervisorial tactics during various periods prior to the infliction of his emotional breakdown. Thus, there was no opportunity or reason for Buell to develop the record below in order to meet the summary judgment motion, nor was there a need to set forth the specific facts that had appeared in the record on the causation, nature and extent of the injury Buell suffered. Similarly, the District Court did not concern itself with the portions of the record bearing upon Buell's injury.

The problem caused by the unmatured record on the subject of Buell's injuries is illustrated by the fact that Santa Fe chooses to speak of Buell as ultimately being merely "disenchanted" with Wright. (Pet. Br. 28.) On the other hand, Buell asserts, on the basis of the record facts, that he suffered what his treating psychiatrist termed "a severe psychotic illness" as a result of the intentionally abusive treatment he received. Buell submits that the legal issue of the FELA recoverability for psychiatric injury should be decided on the basis of facts that have been established by the trier of fact and are not capable of such wide differences in characterization.[10]

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[10] There are many other differences in the views of Santa Fe and Buell of the facts in this case as developed in the pre-trial discovery and motion proceedings. Another involves the statement of Santa Fe that Buell makes no allegations of "physical contact or threat of physical contact." (Pet. Br. 5.) However, Buell's complaint includes broad allegations, encompassing the record facts that show his injuries were

Because the record on the exact cause and nature of Buell's injuries is incomplete, Buell submits that the question of whether the FELA provides for recovery for solely psychiatric injury should be deferred until this Court has a fully developed factual record on which to focus its consideration of the issue. A trial upon remand will pass on the factual issues of whether only psychiatric injury was suffered by Buell and whether Santa Fe's failure to curb Wright and Williams caused, in whole or in part, such injury. Only when such issues have been resolved will the question of the FELA recovery for psychiatric injury be truly appropriate for the consideration of this Court.[11]

## III

## THE RECORD CONTAINS EVIDENCE ESTABLISHING THAT BUELL'S INJURIES WERE IN PART PHYSICAL, WERE ACCOMPANIED BY OFFENSIVE PHYSICAL CONTACT, WERE PARTIALLY CAUSED BY A COMMON LAW ASSAULT AND WERE CLEARLY INTENTIONALLY INFLICTED; THEREFORE, BUELL'S INJURIES ARE NOT WHOLLY MENTAL OR PSYCHIATRIC IN NATURE.

In reviewing a summary judgment, the facts must be viewed in the light most favorable to the party opposing and appealing from the summary judgment. 10A Wright, Miller & Kane, Federal Practice and Procedure, section 2739 at 525-26 (1983), *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 357 (1982) (Powell, J., dissenting). In the case at bar, this principle is particularly compelling in connection with the FELA mental injury issue, which was not mentioned by Santa Fe in its summary judgment motion. Therefore, the complaint allegations mentioned hereafter must be accepted as true and the hereafter mentioned

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produced in part by physical contact, together with verbal intimidation and harassment, and that he suffered physical, as well as mental, injury.

[11] Of course, other trial court decisions that present the legal issue of FELA coverage of psychiatric injury will more than likely be made the subjects of petitions to this Court before this case, if remanded, is made the subject of a second petition to this Court.



items of evidence must be accepted as if they were uncontroverted.[12]

It is common ground that injuries for emotional distress accompanying physical injuries are recoverable under the FELA. *See*, e.g., *Erie R. Co. v. Collins*, 253 U.S. 77, 85 (1920); *Bullard v. Central Vermont Railway, Inc.*, 565 F.2d 193, 197 (1st Cir. 1977); *Hayes v. New York Central R. Co.*, 311 F.2d 198, 201 (2d Cir. 1962). It is beyond argument that there is no requirement that "physical impact" be the cause of injury under the FELA. *Randall v. Reading Co.*, 344 F. Supp. 879, 881-2 (M.D. Pa. 1972) is one of many decisions over the last 40 years so holding. In *Randall*, the alleged employer negligence was in failing to furnish prompt medical attention to an employee suffering a heart attack. The court refused to read the word "injury" in section 1 of the FELA as meaning accidental "bodily injury." 344 F. Supp. at 881-82, and see *Williams v. Atlantic Coast Line Rail Co.*, 190 F.2d 744, 748 (5th Cir. 1951); *Miller v. Elgin, Joliet & Eastern Ry. Co.*, 177 F.2d 224 (7th Cir. 1949); *Stewart v. Baltimore & O.R. Co.*, 137 F.2d 527 (2d Cir. 1943).

Emotional injuries coupled with physical injuries are compensable under FELA, and physical injuries are compensable under the Act without physical impact. It follows that if Buell proves the gastritis he suffered was caused by the abuse of Wright and Williams, he would recover for his psychiatric injury as well. This is, of course, consistent with the general law of torts. If there is any physical injury resulting from the infliction of emotional distress, the injured party may recover for the emotional distress. Dobbs, Keeton & Owen, Prosser & Keeton, Law of Torts, section 54, 362-65 (5th ed. 1984); Restatement (Second) of Torts, section 46, comment k; section 47, comment b.

The partial record also includes uncontradicted evidence of physical impact inflicted upon Buell in the course of the abuse he suffered from Wright and Williams. (Buell Dep. 101-102.) Again, it is beyond dispute under general tort law principles, that if a plaintiff suffers offensive and threatening physical contact,

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[12] In point of fact, most of the items of evidence reviewed in this portion of Buell's argument *are uncontroverted*.

recovery for mental injury caused by such an invasion is always available, even though the physical impact might be denigrated as trivial or inconsequential. Dobbs, Keeton & Owen, Prosser & Keeton, Law of Torts, (5th ed. 1984) section 54, 363-365.

The record is also replete with evidence showing a common law assault. Such an assault consists of *either* an act *or* words of immediate physical threat that excite an apprehension of battery in the plaintiff. Dobbs, Keeton & Owen, Prosser & Keeton on Torts, section 10, 43-46 (5th ed. 1984) and Restatement (Second) of Torts, section 21 (1965). The shoving of Buell by Williams and the constant intimidation during the period of special treatment were the acts and words that made Buell intensely fear for his life on the worksite. (See Excerpts, Tab 44, Exhibit A.) If such a common law assault is present, FELA recovery for mental injury that may be produced by the assault is clear. See *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 815 (7th Cir. 1985).

Finally, the record clearly shows that the mental injury suffered by Buell was intentionally inflicted through the prominently displayed cartoons, threats of illegal firings and continued abuse and hostility of Wright during the special treatment period.[13] If mental injury is inflicted as an intended consequence of a tortfeasor's actions, the general principles of tort law clearly allow for recovery. Restatement (Second) of Torts, section 46 (1965). In determining whether the conduct of the tortfeasor was outrageous, it is generally assumed that significant abuse by a person in a position of authority over the injured party is outrageous, and that intentional exploitation of an emotional vulnerability by the tortfeasor should be considered. Restatement (Second) of Torts, section 46, comments e and f (1965). In this case, there is ample evidence of both Wright's calculated abuse of his supervisorial capacity over Buell and the intentional exploitation of Buell's concern about his appearance.

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[13] It should again be noted that Wright may have made other threats to Buell, but Santa Fe's counsel chose not to pursue this subject to its conclusion during discovery procedures.



The four facts mentioned in the preceding paragraphs remove Buell's claim for injury from the "wholly mental" injury tort category for the reason that each of them "verifies" the existence of the injury. Thus, the presence of any one of them alleviates the concern of some courts over the real or imagined prospect of falsified claims of mental injury. Dobbs, Keeton & Owen, Prosser & Keeton on Torts, section 54, 360-361 (5th ed. 1984).

Buell's Complaint contains allegations that clearly encompass eventual proof of the facts mentioned above: physical contact, physical injury, common law assault and intentional infliction of mental injury. Paragaph IV states that Santa Fe "failed to provide [Buell] with a safe place to work, including, but not limited to having fellow employees harass, threaten, intimidate [Buell] . . . in order to cause personal injury to [Buell] and to cause mental and emotional suffering." (J.A. 7.) Paragraph V further states that Santa Fe's conduct caused Buell "to suffer personal injuries [and] severe mental and emotional injuries." It is therefore surprising to read in Santa Fe's brief that Buell "did not allege any physical contact or threat of physical contact." (Pet. Br. 5.) Buell has supplied adequate facts, all within the compass of his complaint allegations, to prove physical contact, the threat of such contact, physical injuries, assault, and intentional infliction of emotional distress. These facts were not mentioned by the District Court and the Ninth Circuit solely because of the limited scope of the Santa Fe motion for summary judgment. However, those facts exist and remove Buell's claim far from the "solely mental injury" category to which Santa Fe would consign it.

Santa Fe previously stated in the Petitioner's Reply Brief that there are three "basic categories" of worker claims potentially involving the question of RLA-FELA preclusion. (See Petitioner's Reply Brief, pages 5-7.) The categories are (1) negligence claims not arising out of workplace grievances, (2) claims arising out of employer/employee workplace disputes in which there is either physical contact, threat of physical contact or physical injury, and (3) claims generated by workplace disputes but involving no physical contact, threat or injury. As viewed by Santa Fe, the FELA validly applies to claims in category 1, the

FELA cannot be invoked for claims in category 3, and category 2 contains "the hard cases," about which Santa Fe expresses no opinion on the application of the FELA.

Perhaps what makes the second category "hard" for Santa Fe is that all courts considering the matter have held that the FELA applies to claims in that category. Thus both *Lancaster v. Norfolk and Western Ry. Co.*, 733 F.2d 807 (7th Cir. 1985) and *Yawn v. Southern Railway Co,* 591 F.2d 312 (5th Cir. 1979) held that when physical contact, threat or injury to a worker accompanied a dispute in the workplace, the worker may recover for mental injury against a negligent employer under the FELA. Although Santa Fe contends that Buell's claim does not fall in category 2, his claim most certainly does. The facts developed in the Buell deposition actually disclose the same type of physical pain from gastrointestinal disturbances that constituted the physical manifestations of the worker injuries in the Yawn decision (Buell Dep. 7/17-8/9, Excerpts, Tab 44, Exhibit A and *Yawn, supra,* 591 F.2d 312 at 314.) It is sound law that when there are physical attributes to either the cause or the nature of the injuries suffered by a worker, a classic FELA claim arises, and should be allowed, regardless of the existence of the RLA.

## IV

## IF THIS COURT CHOOSES TO ADDRESS THE ISSUE OF FELA RECOVERY FOR SOLELY PSYCHIATRIC INJURY, THE LANGUAGE OF THE STATUTE, THE CONGRESSIONAL PURPOSE IN ENACTING IT AND THIS COURT'S CLEAR AND CONSISTENT DECISIONS ON THE SCOPE OF THE STATUTE SUPPORT THE NINTH CIRCUIT'S HOLDING THAT SOLELY PSYCHIATRIC INJURY IS COMPENSABLE UNDER THE FELA.

### A. The Authorities and Logic Contained in The Ninth Circuit's Opinion Are Convincing.

On the issue that it addressed, without the benefit of a developed trial court record or briefing by the parties, the Ninth Circuit clearly came to the correct conclusion. The FELA allows for the recovery of damages for mental injury in the event that the worker



injured by employer negligence suffers only mental injury. To borrow appropriate language from the crucial decision of this Court in *Urie v. Thompson,* 337 U.S. 163 (1948):

> Considerations arising from the breadth of the statutory language, the Act's humanitarian purposes, its accepted standard of liberal construction in order to accomplish those objects, the absence of anything in the legislative history indicating a congressional intent to require a restricted interpretation or expressly to exclude such [mental injury], and the trend of existing authorities dealing with the question, combine to support this conclusion. (*Urie v. Thompson,* 337 U.S. at 180-81)

*Urie,* which will be discussed at length hereafter, determined that injury caused by occupational disease was compensable under the FELA, and the force of the policies endorsed in that decision control any issue of compensability of mental injury under the Act.

A review of the considerations mentioned in the *Urie* decision and the application of each to the case at bar is instructive. First, the cause of action asserted by Buell is expressed in the most unconstrained and expansive language that Congress could employ to remove any question of narrow interpretation. The pertinent portion of 45 U.S.C. section 51 provides for recovery by ". . . any person suffering injury while he is employed by [a railroad] . . . for such injury . . . resulting in whole or in part . . . from the negligence of any of the officers, agents or employees of [the railroad]." Absolutely no restriction on the type of injury that should be considered compensable is indicated. The statute refers to "injury"— not to "bodily injury" or "physical injury."

To overcome the clear language of the statute, Santa Fe quotes the House Report on the bill as stating that the FELA was intended to "make the employer liable for injury caused by defects or insufficiencies in the roadbed, tracks, engines, machinery and other appliances used in the operation of railroads." (Pet. Br. 26-27, quoting H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908) at 2.) The implication, according to Santa Fe, of this passage is that Congress was unconcerned about railroad workers

who might be injured by the acts of fellow workers not involving railroad equipment. However, the statute itself imposes liability on a railroad for injuries resulting from the negligence of "any of its officers, agents, or employees . . . *or* by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. section 51, *emphasis added.* Indeed, the paragraph of the House Report appearing immediately before the partial sentence quoted by Santa Fe stresses the purpose of the Act to protect a railroad worker from the negligence of a coservant and to impose liability upon the railroad for failing to take all reasonable steps to insure that workers under its supervision will not injure each other:

> The master should be made wholly responsible for injury to the servant by reason of the negligence of a coservant. He exercises the authority of choosing the employees, and if made responsible for their acts while in line of duty he will be induced to exercise the highest degree of care in selecting competent and careful persons and will feel bound at all times to exercise over employees an authority and influence which will compel the highest degree of care on their part for the safety of each other in the performance of their duties. H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908) at 2.

It has, of course, long been unquestioned that a railroad that negligently hires, retains or supervises a worker is liable under section 51 for the *intentional* torts of that worker visited upon coworkers. 32 Am. Jur. 2d, Federal Employers Liability and Compensation Acts, § 25. Thus, it is obvious that the intent of Congress in passing section 51 was to remove the risk of unsafe actions on the part of co-workers from the shoulders of railroad workers and place the liability for any such unsafe actions upon the railroad company, if the company could have reasonably prevented the intentional action of a co-worker. If the unsafe act of the co-worker is negligent, the company is liable without fault. This humanitarian aim was the product of Congress' understanding of the inability of a railroad worker to protect himself from unsafe acts of co-workers which could seriously injure him. H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908) at 2. As long as a co-



worker's unsafe act causes actual injury, only the most crabbed reading of the statute could hold it inapplicable (assuming negligence on the part of the railroad if the injury was intentionally inflicted.) This Court has previously reviewed the purpose of the FELA and rightly concluded that under the FELA, the railroad is "obligated to bear the burden of *all injuries* befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 330 (1958), *emphasis added.*

Not surprisingly, this Court has long held to a standard of liberal construction of the terms of section 51, including the term "injury." In *Urie v. Thompson, supra,* this Court held that the word "injury" included injuries from occupational diseases, and need not be inflicted by "external, violent or accidental" means. The only fact of importance on the applicability of the FELA to an injury was whether "it results from the employer's negligence." 337 U.S. at 180. The fact that accidental injuries were the major causes of injury and death to railroad workers and were the primary focus of Congress in passing the FELA was duly noted, but the unanimous Court held that no injury to a railroad worker could be considered outside the scope of section 51:

> . . . [N]othing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage any injury resulting 'in whole or in part from the negligence' of the carrier. If such an intent can be found, it must be read into the Act by sheer inference.
>
> The language is as broad as could be framed: 'any person suffering injury while he is employed;' 'such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier;' 'by reason or any defect or insufficiency, due to its negligence, in its cars, engines, appliances,' etc. On the face of the Act, *every* injury suffered by *any* employee because of the carrier's negligence was made compensable. The wording was not restrictive as to the employees covered; the cause of injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting.

> To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sort of harms inflicted, would be contrary to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court. (*Jamison v. Encarnacion,* 281 U.S. 635, 640: "The Act is not to be narrowed by refined reasoning ... It is to be construed liberally to fulfill the purposes for which it was enacted ... ") 337 U.S. at 182.

*Urie* is also informative by way of analogy. In 1949, society's knowledge of the causes and effects of occupational diseases was quite primitive by today's standards. However, the Court in *Urie* held that because occupational torts were recognized in some jurisdictions and were becoming more commonly accepted as compensable injuries, section 51 should afford injured railroad workers recovery for such harms. (337 U.S. at 182-187.) Adventuresome decisions of several state and federal courts allowing FELA recovery for silicosis and industrial poisoning victims were applauded by this Court with the following language:

> We think they were made in the spirit the statute contemplated for its administration and application. That spirit is one not in conformity with importing nice distinctions in applying the Act's broad and general terms or cutting down their full scope by inference or implication. 337 U.S. at 186.

Today, the sophistication and experience of state and federal courts concerning psychiatric injury is much greater than the expertise possessed by their predecessors regarding occupational disease in the 1940's. Indeed, recovery for both negligently inflicted, as well as intentionally inflicted, mental injury has been accepted by courts and commentators for decades. Thus, if this Court in *Urie* considered occupational disease injury compensable under the FELA because of the developing common law and lower court FELA decisions in 1949, a fortiori the Ninth Circuit decision on this point is correct.

Federal courts hearing FELA actions have long awarded damages for emotional distress accompanying physical injuries. E.g.,



*Erie Ry Co. v. Collings,* 253 U.S. 77, 87 (1920); *Bullard v. Central Vermont Railway, Inc.,* 565 F.2d 193, 197 (1st Cir. 1977). Thus, the evaluation of the reasonable forseeability of such injury, its nature and extent and the proper amount of damages to compensate for such injury are issues on which FELA courts have considerable experience at the time.

On the precise issue of FELA compensability for purely emotional injury, the California Supreme Court, over twenty-five years ago, held that the Act affords recovery for such an injury in *McMillan v. Western Pacific Railroad Co.,* 54 Cal. 2d 841, 9 Cal. Rptr. 361, 357 P.2d 449 (1960). In *McMillan,* a train dispatcher claimed his employer was liable on a "direct" negligence basis because the employer had negligently subjected him to unusually stressful working conditions in operating the central traffic control system for the railroad. This negligence was alleged to have led to the plaintiff's nervous breakdown which rendered him " 'sick, sore, lame and disabled.' " 54 Cal. 2d at 841, 9 Cal. Rptr. at 361, 357 P.2d at 449. Relying heavily on *Urie,* the court noted the crucial fact that "injury" as used in the FELA "is not qualified by 'accidental' or 'bodily' or any other modifying word or words" and held that a valid FELA cause of action had been stated. 54 Cal. at 843-5, 9 Cal. Rptr. at 362-3, 357 P.2d at 450-1.

All of the published federal decisions that have addressed the issue of recovery for solely mental injury under the FELA are consistent with the Ninth Circuit holding in this case. In *Yawn v. Southern Railway Co.,* 591 F.2d 312, 317 (5th Cir. 1979) the court relied upon *Urie* and, in dicta, indicated that railroad employees suffering solely nervous injury should recover under the FELA. *Lancaster v. Norfolk and Western Ry. Co.,* 773 F.2d 807, 813, 815 (7th Cir. 1985) held, without mentioning *Urie,* that mental injury caused by a common law assault is compensable without physical injury under FELA. Finally, *Taylor v. Burlington Northern R.R. Co.,* 787 F.2d 1309, 1313 (9th Cir. 1986) follows the law of the circuit established in Buell and holds that

the FELA provides for damage recovery for solely mental injury.[14]

Only Judge Posner's statement in dicta contained in *Lancaster v. Norfolk and Western Ry. Co., supra,* gives any support to Santa Fe's position (See Pet. Br. 27, footnote 29). The quoted sentence from the *Lancaster* opinion does state that purely emotional injury is not compensable under the FELA. 773 F.2d at 815. However, the example supplied by the *Lancaster* court to explain its thinking is a complaint for emotional distress caused by wrongful discharge. 773 F.2d at 815. This example conclusively shows that the court had in mind a non-workplace safety related claim, and therefore was not addressing an FELA covered situation. Telling a worker that he or she is fired can well be traumatic to that person, and the firing may constitute a grievance, but it does *not* constitute a problem of workplace safety. Furthermore, as discussed above, *Lancaster* actually holds that infliction of emotional distress through conduct that is not arguably justified under a term of the collective bargaining contract *is* a valid subject for an FELA claim. (See Argument I.C.2.c., above.) *Lancaster* also indicates the proper method to resolve any "conflict" between the RLA and FELA through the use of this Court's reasoning in the *Farmer v. Carpenters* decision. (See discussion of this point in argument I.C.2.c., above.)

Although Santa Fe has continually referred to actions seeking relief for infliction of emotional distress as "artful pleading," the cause of action has been recognized under general common law tort principles since the Nineteenth Century. See Dobbs, Keeton & Owen, Prosser & Keeton on Torts, section 12, 57-58 (5th ed.

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[14] Two unreported circuit decisions have been cited by Santa Fe as supporting its argument that the word "injury" in the FELA means "physical injury." From the cursory recitation of the facts in both, there is no indication that alleged infliction of emotional distress occurred in the workplace, or had any connection with workplace safety. See *Adkins v. Chesapeake and Ohio Ry. Co.* (4th Cir. 1985), a one-half page decision with no citations or reasoning (Pet App 16a), and *Antalek v. Norfolk and Western Ry. Co.* (6th Cir. 1984) (Pet App 22a), a decision apparently relying upon the preemption decisions that Santa Fe misleadingly cited to the District Court in this case.)



1984). While there are difficulties with evaluating the validity of an individual claim, there is no doubt that such injuries are real indeed to those who suffer them. Thus, all commentators agree that the tort should be recognized in a civilized society. Dobbs, Keeton & Owen, Prosser & Keeton on Torts, section 54 at 360 (5th ed. 1984); Harper, James & Gray, 3 The Law of Torts, section 18.4 at 685-86 (2d ed. 1986); Dooley, 1 Modern Tort Law, section 15.03 at 364 (1982). If the universally acknowledged humanitarian and reformist purpose of Congress in passing the FELA has *any* meaning, railroad workers should be allowed to seek recovery for such injuries under the statute. As shown in argument IV.B., below, a holding that purely emotional injury is not compensable under the FELA would impose a perverse, unintended restriction upon the rights of railroad workers that Congress would never have intended under the FELA.

Probably for the reason that the resolution of the issue is so clear, Santa Fe does not attempt to argue that solely emotional injury is not compensable under the FELA as a general matter. From the argument headings of Petitioner's Brief and the content of those arguments, it appears that the Santa Fe position is merely that if a grievable dispute is the genesis of emotional injury, assertion of an FELA claim by the injured worker is precluded by the RLA. (See Pet. Br. 26-27.) In argument I above, Buell has responded to that position by arguing that intentional infliction of emotional distress of the type found in this case is not a grievable dispute, and if it could be so considered, the FELA should still be available to an injured worker under either of the analyses provided by this Court in the *McDonald* and *Farmer* decisions. (See Arguments I.C.2.a.-c., above.)

The major arguments that the FELA should not apply to purely emotional injury situations are made by amici in support of Santa Fe. Amicus National Railway Labor Conference ("Conference") argues that the FELA was enacted with the common law concept of injury in the collective mind of Congress. Thus, the common law as of 1908 (or perhaps 1906—see Conference Brief, p.21) should control any interpretation of the word "injury." However, no one assumes such a static conception was intended by a Congress seeking to a class of disadvantaged workers by

passing a statute intended to endure as long as railroads might operate. Certainly any reading of this Court's 1949 *Urie* decision adequately dispells any such notion.

Amici Association of American Railroads and National Association of Railroad Trial Counsel ("Associations") offer a classic "sky will fall" argument. The Associations argue that some unspecified percentage of the 183,000 grievances reportedly handled annually by the railroads, or some unspecified percentage of the 5,500 grievances formally terminated last year by RLA established boards, will flood the United States District Courts unless this Court holds that solely psychiatric injury is not compensable under the FELA. (Associations Br.p.14-16.) However, no such flooding of California courts has been noticed in the twenty-six years since the supreme court of that state approved FELA causes of action alleging negligent infliction of emotional injury. *See McMillan v. Western Pacific Railroad Co., supra.* Furthermore, it is extremely unlikely that any more than a few of the annual harvest of grievances involve infliction of emotional distress by the type of conduct found in this case, i.e., conduct totally unrelated to any term of the applicable collective bargaining agreement. Finally, the fact that a few more cases might be filed in federal District Courts to secure railroad workers the benefit of the court procedures that Congress intended them to have is hardly a reason to deny those workers the right to seek compensation for solely psychiatric injury under the FELA.

Finally, there is another argument Buell wishes to present to the Court regarding Congressional intent and the RLA. Although the argument might have been included with a number of the points addressed above, it is complex and forceful enough to merit the following separate statement.



**B. A Ruling That Railroad Workers Cannot Seek Damages for Intentionally Inflicted Mental Injury in an FELA Action Would Deny Railroad Workers the Right to Seek Such Damages in Any Forum, Even in States in Which All Other Workers Are Free to Seek Such Damages Under State Causes of Action; and Such Inequitable Treatment of Railroad Workers Could Not Have Been the Intention of Congress in Passing the FELA and Could Not Be Considered a Reasonable Interpretation of That Statute.**

At the present time, the law of many states allows for actions seeking recovery for the intentional infliction of emotional distress. Dobbs, Keeton & Owen, Prosser & Keeton on Torts section 12 (5th ed. 1984); 38 Am. Jur. 2d, Fright, section 4 (1968). Actions by employees against fellow workers or supervisors have frequently been allowed under this cause of action. However, railroad workers covered by the FELA will be denied the right to seek monetary damages in any forum if this Court accepts the argument that the FELA does not provide for the recovery for damages suffered as the result of a purely mental injury. This could hardly accord with the clearly manifest intent of Congress in passing the FELA to give railroad workers greater protection through court actions than was available to workers generally under state laws. To deny recovery under FELA for such an injury would relegate railroad workers to a status inferior to that of other workers. The result of denying FELA recovery for solely mental injury would have this bizarre effect for two reasons.

First, the FELA supersedes the common law and state laws of any type which relate to the liability of railroads for injury to employees in the course of their employment. 32 Am. Jur. 2d, Federal Employers' Liability and Compensation Acts, section 4 (1982); *South Buffalo Railway Co. v. Ahern,* 344 U.S. 367, 371 (1953); *Erie Railroad Co. v. Winfield,* 244 U.S. 170, 172 (1917). Thus, in such states as California, in which workers who suffer intentional infliction of emotional distress may bring a state cause of action to obtain damages, railroad workers would not be able to do so.

Second, if the circumstances under which the intentional infliction of emotional distress could be brought before the RLA

Boards as a grievance, those Boards could not award damages for the mental distress, being limited to orders of reinstatement and payment of lost wages. *See Sharkey v. Penn Central Transportation Co.*, 493 F.2d 685 (2d Cir. 1974). Thus, railroad workers would be unable to obtain tort damages available to all other workers in many states. This result would clearly not accord with the manifest intent of Congress in passing the FELA to give railroad workers a liberalized and convenient statutory vehicle to obtain recovery for injuries suffered due to employer negligence.

## CONCLUSION

For the reasons set forth above, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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# REPLY

# BRIEF

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No. 85-1140

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

*Petitioner,*

v.

JIM BUELL,

*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## REPLY BRIEF

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## REPLY BRIEF

The opening briefs of both parties make clear their agreement that the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, must be harmonized so that, to the extent possible, the purposes of both laws are carried out. Thus, the central issue raised in this case is how the two laws should be harmonized with respect to claims for emotional distress arising out of an employee's disagreement with his foreman's supervision of the workplace. Contrary to Respondent's claims, it is his arguments—not Petitioner's—which would effectively repeal an Act of Congress. If a railway employee is permitted to channel the most elementary workplace dispute into the courts under the FELA by simply alleging that the dispute has caused him emotional distress, Congress' intent that such disputes be resolved exclusively by arbitration under the RLA will surely be thwarted. By contrast, so long as the FELA and RLA are properly harmonized few, if any, conflicts will arise between the two, and certainly no such conflict arises in this case.

In its opening brief, Petitioner argued that Respondent's claims constitute a minor dispute within the meaning of the RLA and thus are subject to the mandatory and exclusive grievance resolution mechanism provided under that Act. Respondent and his amici raise essentially three points in opposition to this argument.

First, they argue that Respondent's claims do not constitute a minor dispute. In their view, Congress intended to limit application of the RLA grievance procedures to disputes involving the interpretation of collective bargaining agreements. Respondent's claims, they assert, are not related to the collective bargaining agreement. These arguments concerning the scope of the RLA are flatly belied by the plain language of the RLA, the Act's legislative history and long-standing decisions of the courts and the National Railroad Adjustment Board ("NRAB"). More-

over, contrary to Respondent's assertion, the claims in this case directly implicate at least two separate provisions of the collective bargaining agreement entered into by Santa Fe and Respondent's union.

Second, Respondent and his amici raise the false spectre that Petitioner's interpretation of the RLA would result in judicial repeal of the FELA. They assert that, under Santa Fe's view of the law, the FELA would not extend to physical injuries to railway employees arising out of unsafe conditions such as improper lighting or defective equipment because such incidents—like those alleged by Respondent—can be characterized as "workplace disputes." These arguments wholly misrepresent Petitioner's position. This case involves claims of emotional distress directly arising out of Respondent's disagreement with his foreman's supervision of the workplace. These claims are plainly not related to the workplace safety concerns which Congress intended to address in the FELA and they are clearly distinguishable from claims arising out of physical injuries caused by physical contact or unsafe conditions such as improper lighting and defective equipment that are cognizable under the FELA. Indeed, from 1906 until 1985, no federal court ever interpreted the FELA to encompass claims for purely emotional injury or claims arising not out of unsafe conditions but as the result of friction between an employee and his supervisor.

Third, faced with the foregoing circumstances, Respondent for the first time in this litigation attempts to recast the facts which underlie his claims. The facts of this case, as *both* parties consistently presented them to the district court, the court of appeals and to this Court in the petition for a writ of certiorari, are straightforward. Respondent contended that he suffered emotional distress as a result of (1) allegedly improper instructions from his supervisor, (2) his supervisor's alleged failure to discipline co-workers who purportedly harassed Respondent, and (3) his supervisor's unfulfilled threats to fire Respondent. Now, however, Respondent argues that his claims do not involve solely emotional



distress arising from a dispute over his foreman's supervision of the workplace, but also involve physical injuries arising from assault and battery. This argument—raised for the first time in Respondent's brief in this Court on the merits—is directly contradicted by Respondent's arguments and representations in the courts below. Respondent's attempt to raise these arguments for the first time before this Court and to blame Santa Fe for Respondent's failure to raise them earlier must be rejected.

## ARGUMENT

### I. RESPONDENT'S ARGUMENT THAT THE RLA DOES NOT APPLY TO HIS DISPUTES WITH HIS SUPERVISOR IS ERRONEOUS.

#### A. Contrary To Respondent's Contention, The RLA Applies To "Grievances" In Addition To Disputes Involving Interpretation Of Collective Bargaining Agreements.

The central argument advanced by Respondent (Res. Br. 14, 19-21, 27-28) and his amici (AFL-CIO/RLEA Br. 7-22; Teamsters Br. 4-5) is also the key legal conclusion underlying the Ninth Circuit's decision. It is that a workplace controversy constitutes a "minor dispute" subject to the RLA's compulsory grievance procedures *only* where the controversy involves interpretation of a collective bargaining agreement. This argument is flatly belied by the language of the RLA itself, which, by its express terms, prescribes detailed procedures "for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" (emphasis supplied). 45 U.S.C. § 151a(5). *See also* 45 U.S.C. §§ 153 First (i), 152 First ("[i]t shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle *all* disputes, whether arising out of the application of such agreements *or otherwise*. . . ." (emphasis supplied)).

In *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 723 (1945), the Court interpreted this statutory language and made clear that the category of minor disputes includes not only controversies over "the meaning or proper application of a particular provision" of a collective bargaining agreement, but also those disputes "founded upon some incident of the employment relation . . . independent of those covered by the collective agreement." As we show below, this seminal interpretation has been followed not only by this Court, but by the lower federal courts as well.

The argument advanced by Respondent also flies directly in the face of Congress' clear purpose in enacting the RLA. As the statute itself states, it is intended "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a(1). It always has been understood that the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas and N.O.R.R.* v. *Brotherhood of Ry. Steamship Clerks*, 281 U.S. 548, 565 (1930). To these ends, the RLA provides detailed procedures for the peaceful resolution of "all disputes." 45 U.S.C. § 151a (4) and (5). These procedures cover the entire universe of railway labor management controversies. The universe is comprised of "major disputes" and "minor disputes." Major disputes involve the formation of or proposed changes in agreements concerning rates of pay, rules or working conditions, while minor disputes involve either the meaning or application of an existing collective bargaining agreement *or* an employment grievance not covered by the agreement. *Burley*, 325 U.S. at 722-28. Section 3 of the RLA creates what this Court has repeatedly held to be a "mandatory, exclusive, and comprehensive system for resolving grievance disputes." *Brotherhood of Locomotive Engineers* v. *Louisville and N.R.R.*, 373 U.S. 33, 38 (1963).[1]

[1] This Court has made clear that federal courts can compel compliance with the mandatory arbitration provisions applicable to minor disputes and can enjoin a union from striking to enforce these compulsory provisions. *Brotherhood of Railroad Trainmen* v. *Chicago River and Ind. R.R.*, 353 U.S. 30 (1957).



In effect, Respondent argues that Congress did not intend the RLA dispute-resolution procedures to be comprehensive in scope. In Respondent's view, Congress divided railroad labor disputes into three categories rather than two. The first two, major and minor disputes, are subject to the detailed procedures set forth in the RLA designed to avoid strikes in the industry. The third category, according to Respondent, consists of workplace disputes not explicitly covered by a collective bargaining agreement, and thus as to which the RLA would not apply. The proposition that Congress left a large gap in its otherwise comprehensive scheme for avoiding rail strikes is contrary to the RLA's unambiguous terms and directly conflicts with Congress' manifest purposes in enacting that Act.

Respondent and his amici rely on two sources of support for their startling argument that Congress did not mean what it said in enacting the RLA and that this Court erred in interpreting the RLA in *Burley*. They rely first on case law subsequent to *Burley*, and second on legislative history. Neither argument is persuasive.

First, they claim, citing *Lancaster* v. *Norfolk and W. Ry.*, 773 F.2d 807, 814 (7th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3717 (U.S. April 17, 1986) (No. 85-1702), that cases following *Burley* have effectively overruled that decision by limiting minor disputes to controversies involving interpretation of collective bargaining agreements (Res. Br. 20; AFL-CIO/RLEA Br. 8-9, 16). However, none of the cases cited in *Lancaster* even addresses the issue raised here. All of those cases simply state that controversies involving the interpretation or application of collective bargaining agreements constitute minor disputes—a point with which no party disagrees. None of these cases deals with the point addressed in *Burley*: that *all* grievances arising out of the employment relationship—whether contractually based or not—are minor disputes under the RLA. Until the decisions

in this case and in *Lancaster*, every case addressing this issue had followed *Burley* in holding that the jurisdiction of the NRAB is not limited to disputes arising from provisions specifically included in a collective bargaining agreement. *See, e.g., Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 551-52 (1959) (The NRAB "was established as a tribunal to settle disputes arising out of the relationship between carrier and employee" and "[t]he purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated"); *Detroit and T. Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142, 159 (1969) (Railroad collective bargaining agreements include only a small portion of the rules governing day-to-day working conditions because "[w]here a condition is satisfactorily tolerable it is often omitted from the agreement, and . . . this practice is more frequent in the railroad industry than most others"); *Railway Labor Executives Ass'n* v. *Atchison, T. and S.F. Ry.*, 430 F.2d 994, 996 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); *Missouri-Kan.-Tex. R. Co.* v. *Brotherhood of Railroad Trainmen*, 342 F.2d 298, 300 (5th Cir. 1965); *Illinois Central R.R.* v. *Brotherhood of Locomotive Firemen and Enginemen*, 332 F.2d 850, 853-54 (7th Cir.), *cert. denied*, 379 U.S. 932 (1964).[2]

AFL-CIO/RLEA also argue (Br. at 9-15) that this Court's interpretation of the scope of the RLA in *Burley*

[2] The fact that disputes like the present one fall squarely within the scope of minor disputes is confirmed by the fact that such disputes have routinely been presented to adjustment boards for resolution. It is commonplace for adjustment boards to entertain claims by employees that they have been subjected to harassment by their employers. *See, e.g., UTU* v. *Baltimore & Ohio R. Co.*, Award No. 360 (Public Law Board No. 1312, March 26, 1979) (stating that the union acting on behalf of its members "has heretofore successfully demonstrated that it is quite competent to handle grievances of proven harassment"); *BRAC* v. *Southern Pacific Transp. Co.*, Award No. 31 (Public Law Board No. 1946, July 8, 1980); *Brotherhood Railway Carmen* v. *Washington Terminal Co.*, Award No. 8481 (NRAB Second Div., October 29, 1980). *See also* cases cited in Brief of National Railway Labor Conference as *Amicus Curiae* at 17-20.



was based on the *Burley* Court's purported understanding that the RLA grievance procedures were merely "optional" and did not preclude court actions related to workplace disputes.[3] However, neither this Court, nor any other court, has ever intimated, let alone held, that *Burley*'s interpretation of the RLA was tied to the notion that RLA procedures were optional or compulsory. Indeed, *Burley* itself refutes the theory that the Court at that time believed that RLA grievance procedures were "optional." The decision emphasized that the 1934 amendments to the RLA were meant to change the prior statutory scheme which called for "voluntary arbitration." 325 U.S. at 727. As a result of the 1934 amendments, the "duty" to negotiate "is not partial" and "[i]n plain terms the duty is laid on carrier and employees alike, together with their representatives; and in equally plain terms it applies to all disputes covered by the Act, whether major or minor." *Id.* at 725 n.18.

AFL-CIO/RLEA also claim that the legislative history underlying the RLA "make clear that the 'grievances' covered by the statutory arbitration system are not all employee-employer disputes, but *only* those involving application of collective bargaining agreements negotiated under the Act" (AFL-CIO/RLEA Br. 17) (emphasis in original). However, this reading of the legislative history is highly selective. To be sure, there are passages in that history stating that disputes over the meaning of collective bargaining agreements are minor disputes. However, no member of Congress stated that the RLA grievance procedures would be applicable *only* to those

[3] The Court had ruled in *Moore* v. *Illinois Central R.R.*, 312 U.S. 630 (1941) that a claim for wrongful discharge could be brought before the NRAB pursuant to the RLA or, alternatively, as a state contract law claim in court. The decision in *Moore* was overruled in *Andrews* v. *Louisville and N.R.R.*, 406 U.S. 320 (1972). However, long before 1972, this Court limited its decision in *Moore* to claims of wrongful discharge because such claims involve instances in which the employment relationship had been severed. *See Slocum* v. *Delaware, L. and W.R.R.*, 339 U.S. 239, 244 (1950); *Pennsylvania R.R.* v. *Day, supra*, 360 U.S. at 553-54.

disputes involving an interpretation of a collective bargaining agreement. To the contrary, as described in the opening brief of Petitioner (at 14 n.11) and the National Railway Labor Conference (at 8-9), the very members of Congress quoted by AFL-CIO/RLEA stated that disputes beyond those relating to collective bargaining agreements were to be subject to the RLA grievance procedures.[4]

In sum, the central argument raised by Respondent and his amici—that the RLA grievance procedures apply only to disputes over contract interpretation—is clearly erroneous.

**B. In Any Event, Respondent's Claims Are Covered By The Collective Bargaining Agreement.**

Respondent claims that the alleged harassment by his supervisor and a co-worker to which he attributes his emotional distress is neither related to nor arguably governed by the collective bargaining agreement (Res. Br. 28). This argument is based on a crabbed interpretation of the scope of the agreement and wholly ignores its grievance provisions.

This Court has emphasized that the scope of collective bargaining agreements in the railroad industry is to be very broadly construed:

> "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts . . . '[I]t

[4] Moreover, contrary to AFL-CIO/RLEA's contention, this conclusion was repeated during the course of subsequent amendments to the RLA. For example, the legislative history underlying the 1966 amendments to the RLA states:

> "The National Railroad Adjustment Board was established in 1934 to provide a machinery for resolving disputes arising in the railroad industry between individual employees and the carriers involved, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions (so-called minor disputes)."

H. Rep. No. 1114, 89th Cong., 1st Sess. at 3 (1965).



> is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant."

*Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966), *quoting United Steelworkers* v. *Warrior and Gulf Nav. Co.*, 363 U.S. 574, 578-79 (1960). The courts of appeals for several circuits have repeatedly held that railway labor disputes which are "inextricably intertwined with the grievance machinery of the collective bargaining agreement" or are "arguably governed" by the collective bargaining agreement or which have a "not obviously insubstantial" relationship to it are minor disputes subject to RLA grievance procedures.[5]

Under these standards, at least two provisions of the collective bargaining agreement between Santa Fe and Respondent's union clearly apply to the claims in the case. Rule 39 of the agreement (Pet. App. 26a) provides a detailed dispute resolution mechanism for "all claims or grievances." Remarkably, neither the court of appeals nor Respondent has ever made any reference to Rule 39. In addition, Rule 40 comprehensively covers employee disciplinary procedures and is plainly applicable to Respondent's allegations that his co-workers were too leniently disciplined or that he was improperly threatened with discharge. Court of Appeals Excerpts of Record, Tab 42, Exhibit C. Although Respondent now claims that these allegations are not part of his complaint, as discussed in Section III, *infra*, that position is wholly at odds with his arguments before the district court and court of appeals.[6]

[5] *See, e.g., Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1370 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) (and cases cited therein).

[6] Respondent also urges (Res. Br. at 32-33) that even if his claims constitute a minor dispute under the RLA, this Court's

## II. THERE IS NO MERIT TO RESPONDENT'S ARGUMENT THAT HIS CLAIMS ARE COVERED BY THE FELA AND THAT A CONTRARY CONCLUSION WOULD ELIMINATE THE FELA.

For nearly 80 years following enactment of the FELA in 1906, no federal court ever held that the Act applied to claims of purely psychological injury.[7] Moreover, no federal court ever held that the FELA applied to claims arising out of an employee's disagreement with his foreman's supervision of the workplace—claims having nothing to do with the concerns for railroad safety that plainly underlay enactment of the FELA. In holding that a claim—clearly subject to RLA grievance procedures and involving neither physical contact nor physical injury—is cognizable under the FELA, the Ninth Circuit failed to honor the principle of statutory construction that federal statutes are to be interpreted, if possible, so as not to create tension with other federal statutes.

decision in *Farmer* v. *United Brotherhood of Carpenters and Joiners Local 25*, 430 U.S. 290 (1977), permits him to bypass the mandatory grievance procedures of the Act. To the contrary, the overwhelming majority of federal and state courts repeatedly have declined to apply the *Farmer* rationale to claims subject to RLA grievance procedures. *See, e.g., Peterson* v. *Airline Pilots Ass'n Int'l*, 759 F.2d 1161, 1168-69 and n.18 (4th Cir.), *cert. denied*, 106 S. Ct. 312 (1985); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045, 1051-54 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1369-70 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Koehler* v. *Illinois Central Gulf R.R.*, 109 Ill.2d 473, 488 N.E.2d 542, 545 (1985), *cert. denied*, 106 S. Ct. 3297 (1986). The principle underlying these decisions is that "the *Farmer* exemption to preemption, by its terms, applies to the preemptive effect of the National Labor Relations Act, *not* to the RLA." *Koehler*, 488 N.E.2d at 545 (emphasis supplied). Unlike the RLA, the NLRA does not expressly establish an exclusive remedial scheme. As this Court has recognized, "since the compulsory character of the administrative remedy provided by the Railway Labor Act . . . stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA." *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320, 323 (1972).

[7] The only contrary authority relied upon by the court of appeals and Respondent is the decision in *McMillan* v. *Western Pacific R.R.*, 54 Cal.2d 841, 357 P.2d 449 (1960).



Respondent raises two principal responses to these arguments. First, he contends that the interpretation of the FELA advanced by Santa Fe would result in the "virtual elimination" of that statute (Res. Br. 19):

> "[Petitioner's] arguments purport to cover *all* FELA tort claims. Thus, if Wright had brought a knife to the worksite and stabbed Buell, these Santa Fe arguments would purportedly apply and an FELA cause of action would be precluded . . . [I]f a grievance could have been filed to protest the working condition of inadequate lighting in the railyard . . . a worker who lost a leg because he could not see an approaching railcar due to such inadequate lighting, could not pursue an FELA claim for recovery."

The false spectre of judicial repeal of the FELA raised by Respondent is based on a wholly erroneous characterization of Petitioner's argument. Petitioner agrees that claims for physical injuries arising out of its failure to provide a reasonably safe place to work are subject to the FELA. Moreover, Petitioner does not contend that the filing of a grievance with respect to an unsafe condition (or the fact that such a grievance could have been filed) extinguishes an employee's right to file an FELA claim if the safety hazard results in physical injury to the employee. Where the gravamen of the plaintiff's claim is a tort falling within the traditionally recognized scope of FELA coverage, the courts are open to him. But courts should not go out of their way to expand the coverage of the FELA beyond its intended and traditional scope where the necessary effect is to repeal the RLA's exclusive coverage of workplace grievances.

There is also no merit to AFL-CIO/RLEA's argument (Br. 4) that Petitioner "does not point to any viable

distinction between this case and the personal physical injury cases traditionally covered by the FELA. . . ." If one looks both to the *source* of the conduct about which Respondent complains and the *nature* of his alleged injury, his claims are plainly distinguishable from a claim properly cognizable under the FELA—one arising as a result of physical contact and involving physical injury. Respondent's claim satisfies neither of these criteria.[8] Although in his brief to this Court Respondent repeatedly posits that his claims involve unsafe working conditions (Res. Br. 2,5,13), the essence of his argument is that friction between himself and his supervisor concerning their respective employment responsibilities and rights somehow constitutes a breach of safety.

Respondent's hypothetical (Res. Br. 19) is useful for highlighting how he has misrepresented Petitioner's view. Assume a workplace in which an employee believes that lighting is inadequate. Plainly such an employee could raise his claim of inadequate lighting as a grievance.[9] Just as clearly, an employee who lost a leg as a result of such inadequate lighting would have an FELA claim, even if he had previously filed a grievance con-

[8] Because Petitioner believes that *both* of these criteria must be met in order to state a claim under the FELA, and Respondent has satisfied neither, the Court could resolve this case without reaching the issue of whether a claim for purely emotional injury is cognizable under the FELA.

[9] Indeed, Rule 46 of the collective bargaining agreement between Santa Fe and Respondent's union states that "reasonable protection will be afforded the health and safety of employees." Railway employees need not—and should not—wait until an unacceptable condition has led to an injury in order to raise a grievance concerning the condition. In this case, Respondent had the right to challenge what he considered to be unacceptable terms and conditions of his daily employment, but failed to pursue such remedies to their conclusion. Moreover, any railway employee who "may be exposed to imminent physical injury" may file a complaint in federal court under the Federal Railroad Safety Act to compel the Secretary of Transportation to issue an order prohibiting the "emergency situation" creating such exposure. 45 U.S.C. § 432(e).



cerning the lighting conditions. Finally, if an employee disagreed with his foreman concerning the adequacy of the lighting, or felt that the foreman had been abusive with respect to the issue, he would be entitled to file a grievance concerning the foreman's conduct. The employee would not, however, have a cause of action under the FELA with respect to such claims in the absence of any physical injury caused by the alleged safety hazard.

A contrary interpretation of the scope of the FELA would mean that any dispute arising out of the railroad employment relationship could be made the subject of an FELA action by the simple expedient of alleging that emotional injury had resulted therefrom. Thus, by artful pleading, any railway employee could directly circumvent the statutory scheme provided by Congress in the RLA to handle precisely such matters. *See Lewy* v. *Southern Pacific Transp. Co.*, 799 F.2d 1281, 1295 (9th Cir. 1986). Accordingly, it is Respondent's arguments, not Petitioner's, which would effectively repeal an Act of Congress. So long as the RLA is given its traditional interpretation as being applicable to employer-employee workplace disputes, and the FELA is given its traditional interpretation as applying to claims involving personal injury to an employee resulting from an unsafe condition, there will be few, if any, instances of tension between these two federal statutes, and this case certainly does not present such an instance.

Respondent also argues (Res. Br. 41-46) that his claims must be found to be cognizable under the FELA in light of the Court's decision in *Urie* v. *Thompson*, 337 U.S. 163 (1949). The question decided in *Urie* was whether "injury" as used in the FELA and the Boiler Inspection Act "is confined exclusively to injuries inflicted by accident" or whether the term encompassed physical injuries occurring over a more extended period of time as a result of exposure to silica. 337 U.S. at 165, 174-76. *Urie* did not involve the RLA or a claim involving an employee's disagreement with his foreman's supervision of the workplace. Nor did it involve a claim

solely for emotional injury. Instead, it dealt with an employee's claim for physical injury arising out of his employer's alleged negligence. Accordingly, the Court in *Urie* plainly was not faced, as it is here, with a case in which it was required to accommodate the competing policies of the RLA and FELA. On this basis *Urie* is plainly distinguishable from this case.

Moreover, while the Court stated in *Urie* that it would apply a "standard of liberal construction in order to accomplish" the Act's "humanitarian purposes," 337 U.S. at 180, it nonetheless looked to the common law to determine Congress' understanding of the term "injury," and found that "at common law" the concept of "injury" did, in fact, include "'the incurring of a disease or harm to health.'" *Id.* at 182 (footnote omitted). By contrast, a review of the common law makes clear that, at the time Congress enacted the FELA, the common law concept of "injury" did not include the incurring of purely emotional distress.[10] This strongly supports the conclusion that Congress did not intend to include such injury within the FELA.

The Court should decline Respondent's invitation to interpret the FELA in 1986 to include purely emotional injury, regardless of Congress' intent at the time of passage. It is an interpretation that would permit the virtually complete repeal of the RLA, a fact which neither Respondent nor any of his amici addresses. The RLA mandates *exclusive* use of arbitration for workplace

[10] In *Southern Express Co.* v. *Byers*, 240 U.S. 612, 615 (1916), this Court, citing over a dozen cases, stated that when a plaintiff made a "claim for mental suffering only . . . the long-recognized common law rule permitted no recovery; the decisions to this effect 'rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health or reputation.' Cooley on Torts, 3d Ed., page 94." As the court explained in *Western Union Telegraph Co.* v. *Sklar*, 126 F. 295, 301 (6th Cir. 1903), "[d]amages for mental pain, grief, disappointment, etc., are recoverable at the common law only when the inseparable accompaniment and result of some bodily pain."



grievances. Exclusive arbitration necessarily excludes lawsuits. Therefore, to whatever extent the FELA is interpreted to authorize lawsuits for workplace grievances, the RLA is *pro tanto* repealed.

Petitioner pointed out in its opening brief that if the FELA can oust the RLA of its exclusive coverage in this case—a workplace dispute involving purely emotional injury with neither physical contact, threat of physical contact or physical injury—then there is no case in which the words of a complaint cannot effectively repeal the RLA. Respondent has not suggested any such case, existing or hypothetical, and we are aware of none.

The only way to avoid effective repeal of either the RLA or the FELA is to avoid a needlessly expansive interpretation of either, and to apply each with appropriate sensitivity to the policies of the other. *See, e.g., Lewy* v. *Southern Pacific Transp. Co., supra*, 799 F.2d at 1294; *Jackson* v. *Consolidated Rail Corp., supra*, 717 F.2d at 1051. So long as that approach is observed, the two statutes may never overlap. It is significant that for the 60 years that the two have co-existed as the principal statutes governing railroad labor relations, it was not until the 59th year that any court ever construed the FELA so as to oust the RLA from coverage of a dispute between a supervisor and an employee over their respective duties and responsibilities. All that we ask is that neither statute be ignored. Absent a needlessly narrow focus on one, to the total exclusion of the other (such as occurred in the court of appeals), their coexistence should continue.[11]

[11] It is of course a theoretical possibility that even with a cautious interpretation of each statute, sensitive to the policies of the other, there may nevertheless be a rare case that falls within the coverage of both. For reasons stated in our opening brief, we believe that if such a case should ever arise (and history would suggest that the possibility is remote), the RLA should prevail. However, that issue need not be reached here. Because Respondent's claims are not cognizable under the FELA, cases cited by Respond-

## III. RESPONDENT'S ARGUMENTS CONCERNING THE DEVELOPMENT OF THE RECORD IN THIS CASE ARE ERRONEOUS.

Apparently recognizing that a claim for emotional distress arising out of an employee's disagreement with his foreman's supervision of the workplace is subject to RLA grievance procedures and not to the FELA, Respondent has used his brief to this Court as an opportunity to recast his claims. He has, in effect, asked this Court to consider for the first time a motion to amend his complaint. Respondent now argues that the gravamen of his complaint is a claim for physical as well as emotional injuries (Res. Br. 16, 24-25, 36-37) allegedly caused by Respondent's foreman who, in concert with one of Respondent's co-workers (Res. Br. 16), allegedly assaulted and battered Respondent (Res. Br. 9-10, 37) as part of a pattern of harassment. These allegations were not stated in Respondent's complaint, nor otherwise relied upon by Respondent in the district court or court of appeals.

Nonetheless, Respondent now contends that he was not required to bring to the trial court's attention any disputed facts as to such contentions because Petitioner purportedly relied solely on general abstract legal principles in support of its motion for summary judgment and Petitioner's counsel allegedly did not permit Respondent to flesh out all of his allegations at his deposition (Res. Br. 4-5). These contentions are erroneous and, more importantly, ignore the fact that it is the party opposing a motion for summary judgment who has the burden of bringing to the trial court's attention material factual issues which are in dispute. *See* Federal Rule of Civil Procedure 56. If there were genuine issues of disputed

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ent (Br. 29-31) involving the question of whether substantive federal rights created under civil rights acts or federal labor laws need to be raised before an arbitrator, are not applicable to the resolution of this case. *See Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).



fact, as Respondent now suggests, he could have, and should have, raised these issues in the trial court by filing appropriate affidavits. Contrary to Respondent's contention, it was not Santa Fe's obligation to do this.

As a review of the record in this case reveals, Respondent has wholly mischaracterized the development of the record in this case. The decisions of the district court and court of appeals were based on a factual record which both parties had an ample opportunity to develop. Respondent should not be permitted to thwart this Court's review of the significant legal issues raised by the Ninth Circuit's decision by improperly changing his allegations in his brief to this Court or by erroneously claiming he was denied an opportunity or motivation to develop the record adequately.

Respondent's complaint was filed on September 2, 1982 (Jt. App. 6-8). The parties subsequently engaged in extensive discovery for over a year including depositions, interrogatories and document requests (Jt. App. 1-3). On March 19, 1984, Petitioner filed its motion for summary judgment (Court of Appeals Excerpts of Record, Tab 42). Consistent with Santa Fe's obligation under the Federal Rules of Civil Procedures, its motion (at 4-5) set forth in detail the facts upon which the motion was based and the portions of the discovery record which established those facts:

> "The principal sources of plaintiffs' quarrel relate to his contentions that (1) he was asked by Foreman Wright to fill out railcar inspection reports (Form 2517 Std.) in a manner which he felt was at variance with the way Mr. Wright's supervisor wanted the work performed (plaintiff's Deposition at Page 15, lines 15-28, through Page 50, line 5); (2) that Company officials did not take seriously his allegations that Mr. Wright was misappropriating Company property by doing such things as taking dunnage (used plywood) home for personal use, taking ice home that had been purchased by the Company, using a Company truck for hauling his

> hay home and letting a relative drive a Company vehicle loaded with used rail ties (plaintiff's Deposition at Page 50, lines 7-28 through Page 75, line 28); (3) that Company officials did not respond appropriately when a cartoon making light of Mr. Buell's physical stature was found posted by an unknown person on Company property (plaintiff's Deposition Page 76, lines 1-28 through Page 99, line 14) . . . ; (4) that despite several meetings between plaintiff's union representatives and Company officials concerning plaintiff's Complaints, nothing was ever done about them (plaintiff's Deposition Page 129, lines 21-28, through Page 136, line 15)."

Based on these facts, Santa Fe argued that Respondent's claims constituted a minor dispute under the required grievance procedures and Rule 39 of the collective bargaining agreement, and thus should be dismissed. In its supplemental memorandum, filed on May 22, 1984, Santa Fe emphasized its belief that Respondent had raised only claims of emotional distress. Its principal argument was headed: "A Claim of Emotional Distress Resulting From An Alleged Course Of Harassment During Railway Employment Presents A Claim Within The Exclusive Administrative Jurisdiction Of The NRAB" (Court of Appeals Excerpts of Record, Tab 48 at 7).

On April 9, 1984, Respondent filed its opposition to the motion. It consisted of a five-page brief and three doctors' reports (Court of Appeals Excerpts of Record, Tab 44). Respondent did not take issue with the facts as presented in Petitioner's motion, but simply quoted from two doctors' reports describing Respondent's injury "as an acute mental illness which was related to job pressures" (*id.* at 2). In his supplemental memorandum, filed on June 11, 1984, Respondent appeared to agree with Santa Fe's characterization of the facts. He stated (Court of Appeals Excerpts of Record, Tab 49 at 3):

> "Plaintiff, JIM BUELL, suffered a severe mental breakdown requiring hospitalization as a result of harassment by his supervisor and co-workers. The harassment consisted of ridiculing plaintiff by post-



> ing a caricature of him as a hippopotamus and threatening plaintiff's life. This harassment came about after plaintiff resisted what he felt were certain illegal activities (by his supervisor) such as his supervisor misappropriating company property (see plaintiff's exhibits A, B, C, defendant's exhibits A, B.)"

Respondent appeared to concede that his claim for damages was based on emotional distress as he argued both in his opening memorandum (at 3) and in his supplemental memorandum (at 2) that the FELA was not limited to "bodily injuries" or "suddenly caused injuries."

Based on these facts and arguments the district court properly found that Respondent's claims "fall within the purview of the RLA" (Pet. App. 14a) and on that basis dismissed the case for lack of subject-matter jurisdiction. On appeal, although he argued vehemently against the district court's legal conclusion, Respondent did not take issue with the discussion of the facts in the district court's opinion. To the contrary, in his brief on appeal, Respondent essentially adopted those facts.[12] In its brief in the court of appeals, Santa Fe again emphasized that

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[12] In his initial brief as appellant in the court of appeals, Respondent stated (at 6-7):

> "The facts alleged by plaintiff Buell, and accepted for all purposes in connection with Santa Fe's summary judgment motion, establish that Buell was employed by Santa Fe, a railroad common carrier; that he suffered injury in the course of such employment; and that Buell's injury was caused in whole, or at least in part, by the negligence of Santa Fe in failing to provide a safe workplace (citations omitted). As stated in the Opinion, plaintiff Buell was subjected to harassment and abuse by Wright, his immediate supervisor . . . together with other workmen, plaintiff complained to the appropriate Santa Fe officials, who neglected to either effectively discipline Wright or remove him as a supervisor. Harassment of plaintiff Buell by co-workers then occurred, and, again, Santa Fe negligently failed to take appropriate action. The result of the continued supervisor and co-worker harassment was Buell's nervous breakdown as described by his treating psychiatrist, Dr. Austin."

the case involved claims solely for emotional distress.[13] In its reply brief, Respondent did not take issue with this characterization.

Under these circumstances, Respondent's claim that this case involves a physical injury ensuing out of a "physical assault and battery" (Res. Br. 9) is not supported by his pleading, and is inconsistent with his position before the lower courts. Accordingly, it is not properly an issue before this Court. It is well-established that a party may not raise new issues or allegations which were not considered by the courts below. *See, e.g., Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

Furthermore, as the foregoing discussion demonstrates, the record before this Court and the courts below is sufficiently developed for the purpose of considering the significant legal issues decided by the Ninth Circuit and presented to this Court—how the RLA and the FELA should be harmonized where a railway employee raises claims of emotional distress allegedly resulting from his disagreements with his supervisor. If Respondent now believes that the record was not sufficiently developed before the district court concerning the causes of his injuries (Res. Br. 4-5, 34-36), that clearly is not the fault of Santa Fe, which fully supported its motion for summary judgment with reference to the discovery conducted in this case. Santa Fe having done so, it was Respondent's burden to "go beyond [its] pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548, 2553 (1986). Respondent's attempt to recast the facts underlying his complaint and to blame Santa Fe for his failure to raise certain allegations earlier in this case must be rejected.

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[13] For example, each of the three "issues presented for review" by Santa Fe in the court of appeals characterized Respondent's alleged injury as "emotional distress" (Court of Appeals Brief of Appellee at 1).



## CONCLUSION

For the foregoing reasons, and for those stated in Petitioner's initial brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 3, 1986

# AMICUS CURIAE

# BRIEF

## QUESTION PRESENTED

Whether a railroad employee's claim for mental anguish arising out of a "minor dispute," subject to the exclusive jurisdiction and procedures of the Railway Labor Act, 45 U.S.C. §151, *et seq.*, may nevertheless be the basis for a negligence action under the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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**No. 85-1140**

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THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY,

*Petitioner,*

v.

JIM BUELL,

*Respondent.*

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## BRIEF FOR ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITIONER

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This brief of the Association of American Railroads and the National Association of Railroad Trial Counsel is filed with the consent of the parties, the letters expressing such consent having been filed with the Clerk of the Court.

## STATEMENT OF INTEREST OF AMICI CURIAE

The Association of American Railroads is a voluntary, unincorporated, non-profit trade organization, headquartered in Washington, D.C. Its members con-

stitute the vast majority of the Nation's railroads. They operate approximately 92% of the line-haul mileage, produce approximately 97% of the freight revenues and employ approximately 94% of the railway work force in the United States, having in the aggregate some 300,000 employees subject to the provisions of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, (hereinafter "RLA"). Their interest is in preserving the integrity of the procedures mandated by that Act.

The National Association of Railroad Trial Counsel is a voluntary, unincorporated non-profit organization, headquartered in Los Angeles, California. Its membership consists of over 1,200 trial lawyers, who represent all of the significant railroads operating throughout the United States. One of its principal objectives is to furnish railroad counsel with a forum for the study of legal problems arising in the trial of railroad personal injury cases, including those filed under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, (hereinafter "FELA"), with a particular interest in the substantive law, as well as the strategy and tactics to be utilized in the trial thereof.

## SUMMARY OF ARGUMENT

The decision below allows a railroad worker to sue under the FELA to recover for mental distress arising out of a workplace grievance, notwithstanding the exclusive procedures established for handling such a "minor dispute" under the RLA. Apart from the fact that the decision below was premised upon an erroneous construction of the RLA's express provisions, as well as this Court's decisions concerning the exclusivity of its prescribed remedies, the decision con-



flicts with the various public interests which are served by adjudicating "minor disputes" under the procedures mandated by the Congress, rather than in the courts.

## ARGUMENT

### I. The Decision Below Was Premised Upon An Overly-Restrictive Construction Of The RLA

Mr. Buell has characterized the basis for his complaint below to be his supervisor's abusive and threatening manner of supervising the workplace operation, and harassment by his fellow employees. (Respondent's Brief in Opposition, p. 2). The Ninth Circuit characterized the gravamen of his complaint to be his being injured by his supervisor's and coworkers' intentional and negligent harassment and abuse, and the railroad's negligent failure to stop the harassment even after Mr. Buell's complaints. [Appendix to Petition, (hereinafter "Pet. App."), at p. 2a].

Thus, stripped of language intended to cast his claim under the terms of any particular statute, Mr. Buell experienced a day-to-day grievance growing out of his working conditions, and alleges that the railroad negligently failed to rectify the situation to his satisfaction. Claiming mental injury resulting therefrom,[1] he

[1] The Ninth Circuit devoted most of its opinion to the question of whether a mental injury is compensable under the FELA. Regrettably it failed to appreciate the significance of the fact that the term "grievance" pre-supposes some degree of mental anguish or injury:

> Grievance. * * * A cause of uneasiness and complaint; a wrong done and suffered; that which gives ground for re-

attempts to circumvent the RLA's exclusive procedures by bringing suit under the FELA.

The district court, in granting summary judgment in favor of the respondent, held that plaintiff's exclusive remedy was under the RLA, explaining:[2]

> . . . it becomes apparent that plaintiff's claim falls within the purview of the RLA. Plaintiff's injury flows directly from defendant's alleged failure to take appropriate disciplinary measures with regard to alleged misconduct by plaintiff's supervisor and co-workers.

Moreover, the trial court emphasized that the *source* of the claimed injury was the factor most germane to a proper analysis of the scope of the RLA's coverage:[3]

> Because the injury here had its genesis in a labor problem which constitutes a minor dispute within the meaning of the RLA, the Court is without jurisdiction to entertain plaintiff's claim.

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sistance, as arising from injustice, tyranny, etc.; injury.

*Webster's New International Dictionary* (2nd Edition 1939). While the circuit court recognized its own earlier statement that an employee who "has a legitimate grievance will doubtless have some emotional anguish," (Pet. App., at p. 6a) it incorrectly believed that the only real issue before it was whether mental injury is compensable under the FELA. (Pet. App., at p.7a).

[2] Pet. App., at p.14a.

[3] Ibid. The district court's "source analysis" was entirely consistent with the ". . . disputes . . . *growing out of* grievances or out of the interpretation or application of agreements. . ." language of the Act.



The Ninth Circuit's decision, by contrast, erred in failing to identify the question presented as whether the underlying claim was within the coverage of the RLA; and, to the limited extent it "considered" the issue (apparently not having recognized its centrality), it proceeded to apply an incorrect test which was unsupported by citations to any authority. The Court stated[4] that Mr. Buell's

> . . . *complaint* does not constitute a "minor dispute" within the exclusive jurisdiction of the [National Railroad Adjustment] Board because it is neither related to the collective bargaining agreement nor arguably governed by its provisions.

(emphasis added).

The foregoing analysis is wrong on two scores. First, the issue is *not* whether the "*complaint* constitutes a minor grievance," but, as the district court correctly recognized, whether the injury ". . . had its genesis in a labor problem which constitutes a minor grievance." The correct test which should have been utilized, but which was ignored by the circuit court, is that contained in the express terms of the statute, *i.e.*, whether Mr. Buell's claim is included within the class of:

> . . . *all disputes growing out of grievances or* out of the interpretation or application of agreements *concerning* rates of pay, rules, or *working conditions* . . ."

45 U.S.C. § 151 a(5) (emphasis added).

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[4] Pet. App., at p.7a.

Second, the standard applied by the Ninth Circuit (a "minor dispute" is one which must be related to the collective bargaining agreement or arguably governed by its provisions) was too restrictive. It failed to recognize that an employee's grievance growing out of his daily working conditions, even if not directly involving the interpretation or application of a collective bargaining agreement, is nevertheless a "minor dispute" under the RLA. The restrictive view of the RLA utilized by the Ninth Circuit overlooked not only the express language of the statute, but also this Court's seminal discussion of what constitutes a "minor dispute" under the Act:

> The second class ["minor disputes"] contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation *or to an omitted case. In the latter event the claim is founded on some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g.*, claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

*Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723 (1945)[5] (emphasis added).

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[5] The Court's decision made it clear that the label "minor disputes" does not mean they are unimportant, but rather is to distinguish them from "major disputes" which, under the dichotomy of the RLA, pertain to the formation of collective agreements, or efforts to secure them.



Thus, while paying lip-service to the exclusive jurisdiction of the Board over "minor disputes" under the RLA, the decision below circumvented the Act's exclusivity by an overly restrictive construction of its express provisions.

## II. The Decision Below Jeopardizes The Exclusivity Of The RLA's Procedures As Well As The Underlying Public Interests Therein

The RLA's procedures for handling day-to-day disputes and grievances grew out of a Congressional recognition of the public interests involved in establishing an exclusive means for their final resolution. Experience has shown that more than 180,000 "minor disputes" are handled annually at the level of the "chief operating officer of the carrier designated to handle such disputes," which does not include those disputes settled on the property at lower levels of management.[6] The sheer volume of "minor disputes" serves to magnify the public interests involved in maintaining the integrity of the exclusivity of the RLA, which could be adversely affected if the decision below is allowed to stand.

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[6] To assess the magnitude of "minor disputes" currently being handled under the RLA, *amici curiae* surveyed twelve of the major railroads. The twelve carriers surveyed were the Atchison, Topeka & Santa Fe, Burlington Northern, Chessie System, Chicago & Northwestern, Conrail, Grand Trunk Western, Illinois Central Gulf, Norfolk & Western, Seaboard System, Southern Pacific, Southern Railway and the Union Pacific. The figure reported was in excess of 183,800 at this level.

**A. The Genesis of the RLA's Exclusive Procedures**

Having long recognized the vital importance of the railroads to the Nation's commerce, the Congress was particularly sensitive to the industry's labor problems, whether in formulating labor agreements, or in the disputes which arose out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions.

Earlier legislation having proven ineffective to solve these problems, the Congress enacted the Railway Labor Act of 1926.[7] After experiencing yet further difficulties in obtaining final resolution of large numbers of "minor disputes" (in the aggregate being serious enough to threaten disruption of transportation), the Congress in 1934 enacted sweeping changes to ensure their final resolution.[8] *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 40 (1945). Expressly declared as one of the purposes of the 1934 amendments was the Congress's intention

> . . . to provide for the prompt and orderly settlement of *all disputes growing out of grievances* or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions.

45 U.S.C. § 151 a (5) (emphasis added). The Act provides for the procedures for handling these so-called "minor disputes" on the railroads' property (45 U.S.C. § 152 Sixth), up to the carrier's chief operating officer

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[7] Act of May 20, 1926, Pub. L. No. 69-257, 44 Stat. 577 (1926). *See also* S. Rep. No. 606, accompanying H.R. 9463, 69th Cong. 1st Sess. (1926).

[8] Act of June 25, 1934, Pub. L. No. 73-442, 48 Stat. 1185 (1934).



designated to handle such disputes, and, failing to reach an adjustment in this manner, either party may submit the same to the appropriate division of the National Railroad Adjustment Board (45 U.S.C. § 153 First (i)). The Adjustment Board[9] is authorized to conduct hearings and make awards, including awards for money (45 U.S.C. § 153 First [k] and [o]). Judicial review by the district courts is authorized, but only on the most limited grounds. 45 U.S.C. § 153 First (p) and (q).

One of the leading decisions in enforcing the exclusive jurisdiction created by the RLA over "minor disputes" was *Brotherhood of R. Train.* v. *Chicago R. & I. R. Co.*, *supra*. There, the Court analyzed the history of the RLA as it pertained to the Board's jurisdiction over "minor disputes," and concluded that all concerned with the 1934 Amendments (*i.e.*, the employees, railroads and Congress) understood that the provisions dealing with the Adjustment Board were considered as compulsory arbitration, and the federal courts could maintain the integrity of the Act's exclusive procedures through the injunctive process.

In recent years, the Court has spoken to the integrity of the procedures and exclusive jurisdiction over "minor disputes" under the Act. In addressing the question as to whether a "minor dispute" could proceed outside the RLA, the Court, in *Andrews* v. *Louisville & N.R. Co.*, 406 U.S. 320 (1972), concluded:

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[9] In 1966 the Congress authorized "special boards of adjustment" to overcome the backlog of cases pending before the NRAB. Act of June 20, 1966, Pub. L. No. 89-456, 80 Stat. 208 (1966).

> Thus, the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law.

406 U.S. at 323.[10]

Moreover, the exclusivity of the RLA's procedures is highlighted by the fact that when Congress has intended to allow an employee with a grievance subject to RLA procedures to elect whether to proceed either under the RLA or to avail himself of a remedy under another statute, it has done so specifically and unequivocally, as it did in its 1980 amendments to the Federal Rail Safety Act.[11] Indeed, the express purpose of the 1934 Amendments to cover "*all* disputes" is clear. Any question of alternative remedies

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[10] The Court relied upon its earlier observation that arbitration of a minor dispute was not a matter of voluntary agreement but rather a matter of compulsion under the RLA. *Walker* v. *Southern R. Co.*, 385 U.S. 196, 198 (1966).

[11] 45 U.S.C. § 421, *et seq.*; 45 U.S.C. § 441 (Protection and Rights of Employees) provides:

> (c)(1) Any dispute, grievance or claim arising under this Section shall be subject to resolution in accordance with the procedures set forth in Section 3 of the Railway Labor Act (45 U.S.C. § 153)
>
> * * *
>
> (d) Whenever an employee of a railroad is afforded protection under this Section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection, he must elect either to seek relief under this Section or pursuant to such other provision of law.



is dispelled by the fact that Congress provided a step-by-step procedure for their orderly adjudication, and made no provision whatsoever for either the railroad or the employee to fashion a remedy outside the framework it structured into the RLA.

With respect to the RLA remedy, it should be noted that the decision below,[12] while acknowledging the Board's ability to award reinstatement and lost wages, commented that the Board ". . . may not award damages for emotional injury," thereby implying that Mr. Buell would be relegated to a remedy which is less than adequate. Mr. Buell is covered by various agreements which provide, in addition to other benefits, for medical expenses for on-duty incidents, and thus his ability to obtain reinstatement and back wages results in a more favorable remedy than that accorded an employee subject to the most liberal workmens' compensation statute. By comparison, the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 908(b), limits wage recovery to 66 2/3 per centum of average weekly wages, in addition to medical expenses. Hence, the compensation available to Mr. Buell is more liberal than that afforded a railroad worker whose claim is subject to the Longshore Act.[13]

Obviously, the RLA contains no authorization for an employee, anguished by a work-related grievance, or an adverse resolution thereof, to sue under the

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[12] Pet. App., at p. 2a.

[13] In *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1953), this Court held that notwithstanding the FELA, a railroad brakeman who was injured in a maritime location was limited to claiming compensation under the Longshore Act due to the exclusivity of that later-enacted statute.

FELA because of the railroad's "negligence" in failing to resolve his grievance to his satisfaction. Nevertheless, the decision below clearly authorizes such an alternative procedure. Instead, if his grievance is not resolved to his satisfaction, the RLA requires it to be processed through the highest officer of the carrier, and then to the statutory Board created thereby, authorizing judicial review only upon the most limited grounds.

### B. The Public Interests In Maintaining the Act's Exclusive Jurisdiction Over "Minor Disputes"

Quite apart from the overall public interest in providing a prompt, effective and final resolution of "minor disputes," while at the same time maintaining the stability of labor relations in the railroad industry, there are yet additional public interests in preserving the integrity of the procedures so carefully fashioned by the Congress.

#### 1. The Range of Subject Matter of "Minor Disputes" and the Unique Qualifications of Those To Whom Adjudication Is Entrusted

In addition to the day-to-day grievances and questions which arise in the normal course of any business, the railroad industry, as one of the oldest in the country, has developed its own unique history, together with its own customs, practices, and rules, and experiences grievances and disputes which are unique to the railroad world.

These day-to-day grievances, growing out of disputes over rates of pay, rules and working conditions, are usually predicated upon a simple set of facts experienced by a single employee, or sometimes by a group of employees. However, the resolution of these



grievances is usually not so simple, as they usually entail the interpretation of a railroad's labor agreement which has been negotiated nationally with one of thirteen (13) unions, and/or a local agreement with one of these unions, or an agreement with yet other unions present on the property. In addition, these grievances may involve the interpretation of an operating rule, a safety rule, or one of countless other types of rules unique to the railroad industry. This in turn may require additional interpretation of such rules in light of one or more existing agreements, or in light of custom and practice in the industry.

These grievances and disputes touch upon every conceivable facet of the employment relationship, as well as subsidiary questions relating thereto. Typically they involve questions as to working conditions, work assignments, physical qualifications, rules, operating orders, discipline, transfers and seniority rights, to mention just a few. To adjudicate this wide range of disputes:

> In § 3, Congress has established an expert body to settle "minor" grievances like petitioner's which arise from day to day in the railroad industry. The Railway Adjustment Board, composed equally of representatives of management and labor, is peculiarly familiar with the thorny problems and the whole range of grievances, that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs and practice.

*Gunther* v. *San Diego & A. E. R. Co.*, 382 U.S. 257, 261 (1965).

There is a public interest in having these special types of disputes adjudicated under procedures whereby experts in the field who are familiar with the problems, can render informed decisions which take into account not only a given contract or rule provision, but also the long-established history, customs, and practices of the industry, the so-called "common law of the shop." Neither a judge nor a jury, unfamiliar with this complex background underlying the field of railway labor, has the capability of rendering such informed decisions without being extensively educated through courtroom presentations, which would entail a devotion of undue time by the court and unnecessary expense to the parties, neither of which is in the public interest.

**2. The Efficient Handling of "Minor Disputes"Under the RLA Involves Additional Public Interests**

That the RLA's exclusive procedures for handling annually more than 180,000 "minor disputes" are presently working as intended by the Congress is demonstrated by the fact that only a small percentage of these disputes require resolution by the statutory Boards. The most recent available statistics for those Boards disclose an annual disposition rate of approximately 5,500 cases (1,249 by the National Railroad Adjustment Board, and 4,395 by the "Public Law Boards").[14]

While not focusing upon the number of "minor disputes" involved, this Court has recognized the intent

[14] *See* "Forty Ninth Annual Report of the National Mediation Board, including the Report of the National Railroad Adjustment Board for Fiscal Year Ended September 30, 1983," U.S.G.P.O. 1985 0-466-003, at pp.44-46.



of the Congress as to who should handle their adjudication:

> The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. [citations] *Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts.*

*Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978) (emphasis added).

The public interest in maintaining the ability to effectively adjudicate these "minor disputes" under the RLA's exclusive procedures, and keep them out of the Courts, is obvious.

**a. The Interest in Avoiding Additional Litigation in the Courts**

The decision of the Circuit Court below presents a self-evident potential for a staggering escalation in FELA litigation. The full dimensions of this potential are, of course, presently unknown, the sole determinant thereof being the collective skill of plaintiffs' attorneys in drafting pleadings[15] Nonetheless, the impact of the decision below upon the trial courts may be estimated by referring not only to the number of "minor disputes" presently being adjudicated under

[15] Under the rationale of the decision below, even a single "time claim" could be the basis for an FELA case by the mere allegations of mental anguish arising out of the employee's inability to pay past-due bills owing to creditors.

the RLA, but also to the substantive and procedural problems which will arise if they are allowed to proceed in court under the FELA.

With regard to the first consideration, a comparison of the Boards' statistics with those pertaining to FELA litigation in the federal trial courts is striking. In 1983 and 1984, the federal district courts terminated 1,963 and 2,089 FELA cases respectively.[16] This annual average of 2,000 FELA case terminations equals only 36% of the 5,500 grievances terminated by the statutory Boards under the Railway Labor Act, and equals only one percent (1%) of the 183,800 grievances reported handled last year by the twelve (12) railroads' chief operating officers. Since the 183,800 grievances handled are well in excess of the entire number of annual filings of all private civil actions in the federal courts,[17] the Ninth Circuit's decision creates a potential for doubling the volume of civil filings in the federal courts!

The second consideration involves the important substantive issues and problems of proof which are raised, but not addressed by the decision below. Such issues and problems will be presented in any case where an FELA claim is predicated upon a RLA grievance.

For example, in a case such as the one at bar, where there are allegations concerning the quality of a foreman's instructions, or that the discipline imposed upon co-workers is insufficient, the threshold

[16] *See* "Annual Report of the Director of Administrative Office of the United States Courts," 1983 and 1984, at Table C3B.

[17] 146,039 in 1983, and 149,618 in 1984. *Ibid*, at Table C3.



question presented is whether the case is to proceed upon the "clearly erroneous" or "arbitrary and capricious" standard usually involved in the review of an administrative determination, or whether the issue is to be tried *de novo* before a lay jury? If the latter, by what standard is a jury to judge the discretionary exercise of such managerial prerogatives as the imposition and severity of discipline, or whether the foreman's instructions were proper, particularly since both are grounded in one or more labor agreements, company rules and/or in custom in the industry? Grievances involving discipline and obedience to rules, instructions and orders are easily processed under the RLA, by those intimately familiar with the day-to-day problems of railroading, and who have expertise in dealing with such problems. However, an entirely different situation is presented when such issues are brought before a judge or jury.

Of the many variances in the procedures utilized in the resolution of factual issues under the RLA, as contrasted with those utilized in a court proceeding, probably the most striking example is that involved in the often-disputed question of an employee's physical ability to perform his work, which usually arises in connection with a job assignment. Under the RLA, an inexpensive, effective, and complete resolution is obtained by the long-standing practice of a three-doctor panel (one selected by the carrier, one by the employee, and the third selected by the first two doctors), the majority vote of the panel deciding the issue.[18] In the FELA case (like any other personal injury

[18] This procedure was reviewed by this Court, and held to be binding upon the courts in *Gunther* v. *San Diego & A. E. R. Co.*, *supra*, 382 U.S. at 261-262.

action, after considerable discovery and expense), the jury resolves such medical issues after hearing the conflicting opinions of the physicians retained by each side. Here again, in the grievance-based FELA case, the courts will have to decide whether the decision of the three-doctor panel is binding unless "clearly erroneous" or "arbitrary and capricious;" or whether the panel's decision is admissible merely as an item of evidence; and if so, the quantum of proof necessary to overcome it.

These practical problems will be inherent in any courtroom presentation of employee grievances brought under the FELA, should such actions be allowed to proceed in the district courts. There are presently no pronouncements by this Court or by any of the courts of appeal which address either the substantive issue of the standard to be utilized in this type of case, or the method of proving such a case before a jury.

Because the decision below leaves unanswered these essential questions, a development of case law will be required to meet the widely-varying factual situations inherent in the myriad of railway employees' grievances, and thus a further demand will be visited upon the trial courts in analyzing and adjudicating the wide range of intricate legal issues involved in these cases.

Quite apart from the sheer number of potential FELA cases,[19] the consideration of the additional time which will be required to develop and resolve these

[19] For example, Mr. Buell complains of insufficient discipline meted to his co-workers. Had drastic discipline been imposed so as to cause the co-workers to have mental anguish, they could sue under the FELA under the holding below.



substantive and procedural issues by the trial courts, already struggling under the load of heavy dockets, further underscores the importance of the public interest involved herein, which is jeopardized by the decision below.

**b. The Interest in Maintaining Prompt and Final Adjudication of "Minor Disputes"**

Similarly, the decision below threatens to wreak havoc upon the present processing of grievances under the Act. If the resolution of these grievances is held not to be within the exclusive jurisdiction of the RLA, it could well destroy the effectiveness of the existing procedures for their adjudication, whether "on the property" or before the Board. Under the RLA, such adjudication is ultimately subject to court review only upon the most limited grounds. *See* 45 U.S.C. § 151 First (q). Under the decision below, the FELA "negligence" standard could be utilized to encompass everything from "negligent decision" to "negligent procedures," the grounds being limited only by the creativity of the attorney drafting the complaint. This, in turn, would provoke the adjudicators to adopt defensive measures to "protect their records" by a higher degree of formality in their proceedings and procedures, which in turn, could choke the system and destroy the very effectiveness of the procedures structured by the Congress into the RLA.

There is a subsidiary interest also present in allowing grievances to proceed without undue expense to the parties. The rapidly increasing expenditures of time and money associated with Court proceedings is not present under RLA procedures, where attorneys are rarely involved, and the procedures and proceedings are more informal, involving minimal cost to the

parties in obtaining a fair and informed final adjudication.

The likely effect of the decision below will be to undermine this satisfactory and efficient system for the final resolution of day-to-day disputes and grievances. Indeed, implicit in the holding below is the creation of a "two-way street" whereby not only the employee, but also the railroad or the Board could avoid RLA jurisdiction over any "minor dispute" where the employee displays or claims distress or anguish, irrespective of the nature or degree of magnitude of the dispute or grievance out of which his claim arises.

Thus, the public interests in avoiding having the courts deluged with workplace grievances, as well as that of preserving the RLA's efficient procedures for the prompt and final adjudication of those grievances, are placed in jeopardy by the decision below, which should be reversed.

## CONCLUSION

On the basis of the foregoing, *amici curiae* Association of American Railroads and National Association of Railroad Trial Counsel respectfully submit that the judgment of the Ninth Circuit Court of Appeals in this case should be reversed, and the case remanded to the district court with instructions to dismiss the complaint.



Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

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No. 85-1140

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
*Petitioner*,

v.

JIM BUELL,
*Respondent*.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

## BRIEF OF
## THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1140

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Petitioner,*

v.

JIM BUELL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

### INTEREST OF *AMICUS CURIAE*

Virtually all the nation's Class I railroads are members of the National Railway Labor Conference. The Conference represents its member railroads both in national collective bargaining with unions pursuant to the Railway Labor Act and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearinghouse for information regarding, and renders assistance and advice to member railroads concerning, the system established by the Railway Labor Act for adjusting disputes arising out of workplace grievances or the interpretation of collective bargaining agreements.

This case presents important questions concerning the scope of the adjustment system established by the Rail-

way Labor Act. The decision below, which permits a dissatisfied employee to bring suit instead of pursuing his grievance remedy, subverts the Congressional intent to create a comprehensive, mandatory, and exclusive system for resolving workplace disputes without judicial intervention. That system is critical to peaceful labor-management relations in the railroad industry. The Conference thus has a vital interest in ensuring that the adjustment procedures established by the Railway Labor Act are not circumvented or undercut. Accordingly, the Conference files this brief as *amicus curiae* in support of the petitioner herein.[1]

## SUMMARY OF ARGUMENT

This case presents a question of Congressional intent: did Congress, in enacting the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, intend that disputes arising from the employment relationship between a railroad and its employees be subject to the mandatory and exclusive adjustment procedures established by that Act; or did Congress instead intend that such disputes could be resolved through tort suits brought either under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, or under state law? We submit that the language, legislative history, and consistent judicial and arbitral interpretation of the RLA all indicate that Congress intended that workplace disputes be subject to mandatory adjustment under the RLA, to the exclusion of FELA or state tort law actions.

1. In Part I, we show that the RLA grants exclusive jurisdiction to adjustment boards to decide all disputes that arise out of the railroad employment relationship, including disputes like those involved in this case. By its terms, the RLA applies to "all disputes" growing out of either "grievances" or the "interpretation or application of agreements covering rates of pay, rules, or working conditions," 45 U.S.C. § 151a; thus, the plain language of

[1] Written consents from all parties to the filing of this brief have been filed with the Clerk of the Court.



the Act encompasses not only claims based upon an express term of the collective bargaining agreement, but also those "founded upon some incident of the employment relation . . . independent of those covered by the collective agreement . . . ." *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). The legislative history confirms that Congress intended the RLA to be interpreted in this fashion. In accordance with that Congressional intent, both this Court and numerous other federal courts have interpreted the scope of the RLA broadly, and have held that the adjustment system established thereby is the exclusive forum for pursuing these employment-related disputes. The claims that form the basis of respondent Buell's complaint are precisely the type of workplace disputes that, as Congress intended, adjustment boards regularly consider.

2. In Part II, we show that this case does not involve a conflict between the RLA and the FELA. As its legislative history makes clear, the FELA was enacted because of the dangerous physical hazards inherent in railroad work. There is no indication that Congress intended that the FELA provide relief for purely psychological grievances where, as in this case, there has been neither physical contact nor physical injury. Thus, it is only a strained and incorrect interpretation of the FELA that would bring it into conflict with the RLA on the facts of this case. Moreover, even if the RLA and the FELA were in conflict, the RLA would control, since it is the later-enacted statute and is more specifically directed to claims growing out of employment disputes. A contrary conclusion would increase the risk of erroneous and non-uniform decisions, would disrupt labor-management relations, and would add additional burdens to the already overburdened federal judicial system.

3. In Part III, we demonstrate that the RLA also preempts state tort law remedies for workplace disputes. The mandatory language and comprehensive structure of the RLA indicate that Congress intended to leave no room for state law in this field. Moreover, state tort law

remedies would stand as an obstacle to the realization of Congressional objectives in this area. Like FELA suits, state tort law claims arising out of employment disputes would subvert the RLA scheme by removing those disputes from the adjustment boards Congress deemed best-suited to resolve them and by encouraging inconsistency in an area where Congress intended uniformity. In addition, state tort law claims could result in massive punitive damage awards, posing a potential threat to railroad operations and the interstate transportation dependent thereupon. Finally, even if this Court were to disagree with our view of the scope of the RLA *vis-a-vis* the FELA, it would still be the case that the RLA and the FELA together occupy the field, and leave no room for claims under state tort law.

## ARGUMENT

### I. The Railway Labor Act Gives Railroad Adjustment Boards Exclusive Jurisdiction To Resolve Disputes Growing Out of the Employment Relationship Between a Railroad and Its Employees.

#### A. The Language of the Railway Labor Act Gives Adjustment Boards Exclusive Jurisdiction Over All Disputes Growing Out of the Employment Relationship.

The Railway Labor Act ("RLA"), 44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.*, expressly establishes a "mandatory, exclusive, and comprehensive system for resolving grievance disputes" between railroads and their employees. *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963).

The comprehensive nature of the RLA is apparent from its language, which encompasses all disputes arising out of the employment relationship between a railroad and its employees. Section 2 of the RLA expressly states that one of the Act's purposes is "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a (emphasis added).[2] Such disputes are commonly referred to as "minor disputes" in order to distinguish them from "major disputes," which arise out of the formation or alteration of collective bargaining agreements. See, *e.g.*, *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). As the language of § 2 of the RLA makes clear, minor disputes are not limited simply to claims "growing out of" the "interpretation or application" of collective bargaining agreements—an expansive category in itself—but include "grievances" as well. The broad range of the disputes covered by the RLA is further evidenced by § 2 First of the Act, which makes it the duty of railroads and their employees to "settle all disputes, whether arising out of the application of such [collective bargaining] agreements *or otherwise* . . . ." 45 U.S.C. § 152 First (emphasis added). Thus, as this Court has recognized, the RLA applies both to complaints that rest directly on an express provision of a collective bargaining agreement and to claims "founded upon *some incident of the employment relation* . . . independent of those covered by the collective agreement. . . ." *Elgin, Joliet & Eastern Ry.*, 325 U.S. at 723 (emphasis added).

The RLA establishes a mandatory system for resolving all workplace disputes. Under § 2 Second, "[*a*]*ll* disputes" between a railroad and its employees are required to "be considered, and, if possible, decided with all expedition, in conference" between representatives of the railroad and of the employee or employees interested in the dispute. 45 U.S.C. § 152 Second (emphasis added).[3]

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[2] This same language is repeated virtually verbatim in several other sections of the Act. See § 2 Sixth, 45 U.S.C. § 152 Sixth; § 3 First (i), 45 U.S.C. § 153 First (i).

[3] Either party to a minor dispute may request a conference, which must be held within 20 days of the receipt of such request. § 2 Sixth, 45 U.S.C. § 152 Sixth. In cases in which the initial conference does not resolve the dispute, it "shall be handled in the usual manner" provided by the railroad's internal grievance procedure "up to and including the chief operating officer of the carrier designated to

If a minor dispute is not settled through this conference procedure, either party may then compel a binding arbitration of the dispute by the appropriate division of the National Railroad Adjustment Board ("NRAB"), the members of which are chosen in equal numbers by the carriers and the unions. § 3 First (a) & (i), 45 U.S.C. § 153 First (a) & (i).[4] The Board is empowered "to conduct hearings," *id.* (k), at which the "[p]arties may be heard either in person, by counsel, or by other representatives, as they respectively elect," *id.* (j). Awards, which can include "a requirement for the payment of money," are determined by majority vote of the division of the Board, *id.* (n) & (o); in cases in which there is deadlock or a failure to obtain the requisite majority vote, neutral "referees" are to be agreed upon or appointed, *id.* (l). The Board's awards are "final and binding upon both parties to the dispute." *Id.* (m).

This adjustment system is not only mandatory; it is also exclusive. Judicial review of an adjustment award under the RLA is extremely limited in scope. Under § 3 First (p) and (q), a court may set aside an award only for (1) failure of the adjustment board to comply with the RLA, (2) failure of the board to confine itself to matters within the scope of its jurisdiction, or (3) fraud or corruption. 45 U.S.C. § 153 First (p) and (q). This range of judicial review is " 'among the narrowest known to the law' "; moreover, this Court has rejected

handle such disputes" before being referred to an adjustment board. § 3 First (i), 45 U.S.C. § 153 First (i).

[4] The NRAB has four divisions, each of which has jurisdiction over disputes involving particular categories of employees. § 3 First (h), 45 U.S.C. § 153 First (h). In addition, the RLA provides that, where requested by a union or carrier, additional adjustment boards commonly known as "public law boards" shall be established to resolve any dispute otherwise referable to the NRAB, or any dispute that has been pending before the NRAB for at least 12 months; such boards consist of one union representative and one carrier representative, with a neutral member to be appointed if the representatives cannot agree upon an award. § 3 Second, 45 U.S.C. § 153 Second.



efforts to expand the role of the courts in this process and has "time and again emphasized" that these are the only grounds for judicial review. *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89, 91, 93 (1978). Significantly, apart from this highly restricted review function, the Act makes no other provision for judicial involvement in the resolution of minor disputes under the RLA. As this Court has stated, "[n]ot only has Congress thus designated an agency [the NRAB] peculiarly competent to handle the [minor dispute] here involved, but . . . it also intended to leave a minimum responsibility to the courts." *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 566 (1946). In short, "Congress considered it *essential* to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pacific R.R.* v. *Sheehan*, 439 U.S. at 94 (emphasis added).

### B. The Legislative History of the Railway Labor Act Confirms That Congress Intended To Give Adjustment Boards Exclusive Jurisdiction Over All Disputes Growing Out of the Employment Relationship.

The legislative history of the RLA confirms what its language plainly states. The RLA "draws meaning from its history," and that history reflects "a steady congressional intent to move toward a reliable and effective system for the settlement of grievances" between carriers and their employees. *IAM* v. *Central Airlines*, 372 U.S. 682, 687, 689-90 (1963) (footnote omitted).[5] At each major stage of the evolution of the RLA, Congress made clear its intent to establish a mandatory and exclusive system of self-adjustment that would comprehend all disputes growing out of the employment relationship.

[5] See *IAM* v. *Street*, 367 U.S. 740, 760 (1961) (" '[i]t is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies . . . .' ") (quoting *Elgin, Joliet & Eastern Ry.*, 325 U.S. at 752-53 (Frankfurter, J., dissenting)).

The RLA was originally enacted in 1926. 44 Stat. 577.[6] "'It is accurate to say that the railroads and railroad unions between them wrote the Railway Labor Act of 1926 and Congress formally enacted their agreement.'" *IAM* v. *Street*, 367 U.S. 740, 758 (1961) (quoting *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 240 (1956) (Frankfurter, J., concurring)); see S. Rep. No. 606, 69th Cong., 1st Sess. 2 (1926), RLA Leg. Hist. at 100; H.R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926), RLA Leg. Hist. at 47.[7] The Senate Report stated that under this legislation "*any and all* disputes shall first be considered in conference between the parties directly interested"; minor disputes not resolved in conference could then be referred by either party to boards of adjustment for "final and binding" decision. S. Rep. No. 606, *supra*, at 1, RLA Leg. Hist. at 100 (emphasis added); 44 Stat. 579.

The legislative history of the 1926 Act makes clear that Congress intended the category of minor disputes to be interpreted broadly. During the debates on the 1926 legislation, minor disputes were sometimes characterized as involving the interpretation of existing labor agreements, in order to contrast them with "major disputes" over the formation of such agreements. See, *e.g.*, RLA Leg. Hist. at 192, 205 (statements of Rep. Barkley), 480 (statement of Sen. Watson). But the same speakers emphasized that minor disputes were not limited solely to contractual questions. To the contrary, as Representative Barkley, one of the supporters of the House bill, explained, the adjustment boards were designed to consider "disagreements over grievances, interpretations, discipline, and other technicalities that arise from time to time

[6] For a review of earlier legislation dealing with railway labor issues, see *General Committee of Adjustment* v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 328 n.3 (1943).

[7] Citations in the form of "RLA Leg. Hist." are to Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended (1926 through 1966) (Comm. Print 1974).



in the workshop and out on the tracks in the operation of the roads." RLA Leg. Hist. at 210. Similarly, Senator Watson, a proponent of the Senate bill, stated that the class of minor disputes covered by the legislation consists of

> "what are ordinarily called grievances. *They may be of a personal nature;* they may involve a great many employees; they may involve a few employees; they may involve but one employee. Of this class, *also*, are disputes rising out of the interpretation and application of existing agreements as to wages, hours of labor, or working conditions." *Id.* at 477 (emphasis added).[8]

In short, Congress intended the full range of disputes arising "in the workshop and out on the tracks"—even those of a "personal nature" involving but a single individual—to be subject to the regime of the RLA.[9]

The legislative history also reveals that Congress had two primary reasons for channelling all such employment disputes to the adjustment process. First, Congress was of the view that railroad employment disputes would be better decided by individuals who were well-versed in railroad customs and practices. As one of the supporters of the legislation in the House observed, adjustment boards "understand the problems by reason of their tech-

[8] See, *e.g.*, RLA Leg. Hist. at 176 (statement of Rep. Cooper) (adjustment boards have jurisdiction over "grievances or disputes growing out of a misunderstanding of the interpretation or application of agreements concerning rates of pay, rules, or working conditions"); *id.* at 226 (statement of Rep. Mapes) (disputes "arising out of grievances or out of the interpretation or application of agreements" referable to adjustment boards). Thus, as a contemporaneous commentator noted, "[p]ersonal grievances are also ordinarily included in the category of 'minor disputes,'" along with disputes arising out of contractual provisions. H. Wolf, The Railroad Labor Board 50 (1927).

[9] See RLA Leg. Hist. at 387 (statement of Rep. Robinson) (the plan of the Act was that railroads and unions "select their own boards of adjustment to hear and settle the disputes that may arise in the management and operation of the railroad or division").

nical knowledge of the industry." RLA Leg. Hist. at 176 (statement of Rep. Cooper).[10] Second, Congress adopted the position, which was urged by both the unions and the railroads, that the absence of outside interference in resolving these disputes was the means "best adapted to maintain satisfactory relations between employers and employees." H.R. Rep. No. 328, *supra*, at 2, RLA Leg. Hist. at 48; see S. Rep. No. 606, *supra*, at 3, RLA Leg. Hist. at 102. As Representative Barkley explained, "[t]he history of railroading in this country has demonstrated that the most satisfactory method of adjustment of *all railroad disputes involving labor and working conditions* has been when the men on both sides were permitted to sit down at a table and settle their own disputes without interference from the outside." RLA Leg. Hist. at 194 (emphasis added).[11]

In 1934, Congress amended the RLA in order to close two loopholes that allowed circumvention of the mandatory and exclusive self-adjustment scheme established by the 1926 Act. 48 Stat. 1185. The first loophole was that the 1926 Act provided that boards of adjustment should be established by agreement; in many instances, however, railroads and their employees had been unable to agree

[10] See, *e.g.*, RLA Leg. Hist. at 480 (statement of Sen. Watson) ("These boards of arbitration always are made up of those intimately acquainted with the conditions. Outsiders are not put on the boards. The problems are all of a technical nature, and therefore railroad men are required to decide them.").

[11] See, *e.g.*, RLA Leg. Hist. at 304-05 (statement of Rep. Jacobstein) ("It is my experience that the more responsibility and power you throw the employer and employee the more likely you are to get peace in industry. The bill before us does this very thing. It sets up machinery which throws back upon labor and executives the business of settling their disputes" and thus "keeps out the lawyers in the adjustment of labor disputes"); *id.* at 344 (statement of Rep. Crosser) (adjustment boards would, along with the other boards established under the Act, "serve in a manner as courts to determine who is right and who is wrong, what is just and what is unjust, in disputes between railroads and their employees," and thus prevent them from becoming "tyrants" over each other).



to establish such boards. See *Elgin, Joliet & Eastern Ry.*, 325 U.S. at 725-26.[12] Congress responded by creating the permanent National Railroad Adjustment Board ("NRAB"), consisting of representatives chosen in equal numbers by the railroad unions and the national carriers, and giving it mandatory and final jurisdiction over all minor disputes not adjusted through conference or internal grievance procedures. The second loophole in the 1926 Act was that, even where adjustment boards had been agreed to, deadlocked votes frequently resulted because the boards were composed of equal numbers of labor and management representatives, and the Act provided no procedure for the appointment of a neutral referee; the resulting accumulation of unresolved claims led to strike ballots, *Union Pacific R.R.* v. *Price*, 360 U.S. 601, 611 (1959).[13] In response, the 1934 Amendments established a procedure for the appointment of a neutral referee to break any deadlocked vote of the NRAB.

Significantly, these two loophole-closing amendments to the 1926 Act had been strongly pressed for by unions representing railroad employees. Railway labor spokesmen made it clear that "[t]*he employees were willing to give up their remedies outside of the statute* provided that a workable and binding statutory scheme was established to settle grievances." *Union Pacific R.R.* v. *Price*, 360 U.S. at 613 (emphasis added). As this Court has observed, the legislative "record is convincing that there was general understanding between both the supporters and the opponents of the 1934 Amendment that the provisions dealing with the Adjustment Board were to be considered as *compulsory arbitration* in this limited field."

[12] See generally H.R. Rep. No. 1944, 73d Cong., 2d Sess. 3 (1934), RLA Leg. Hist. at 920; S. Rep. No. 1065, 73d Cong., 2d Sess. 1 (1934), RLA Leg. Hist. at 820; *Union Pacific R.R.* v. *Price*, 360 U.S. 601, 610 (1959).

[13] See generally H.R. Rep. No. 1944, *supra*, at 3, RLA Leg. Hist. at 920.

*Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30, 39 (1957) (emphasis added).

In 1966, the RLA was again amended in order to further ensure that all railroad workplace disputes would be subject to self-adjustment. 80 Stat. 208. The 1966 amendments were designed "to eliminate the large backlog of undecided claims of railroad employees pending before the National Railroad Adjustment Board, and to provide equal opportunity for judicial review of awards of this Board to employees and employers." H.R. Rep. No. 1114, 89th Cong., 1st Sess. 3 (1965), RLA Leg. Hist. at 1309; see S. Rep. No. 1201, 89th Cong., 2d Sess. 1 (1966), RLA Leg. Hist. at 1337. In order to accomplish the first of these goals, the amendments provided that any union or carrier could request the establishment of what are now known as "public law boards," *i.e.*, adjustment boards consisting of one union and one carrier representative, and one neutral if necessary, which are empowered to resolve any dispute otherwise referable to the NRAB. See § 3 Second, 45 U.S.C. § 153 Second. To accomplish the second of these goals, Congress provided that judicial review of adjustment board decisions would be limited—both for carriers and employees—"to the determination of questions traditionally involved in arbitration legislation—whether the tribunal had jurisdiction of the subject, whether the statutory requirements were complied with, and whether there was fraud or corruption on the part of a member of a tribunal." H.R. Rep. No. 1114, *supra*, at 3, 15, RLA Leg. Hist. at 1309, 1321; S. Rep. No. 1201, *supra*, at 3, RLA Leg. Hist. at 1339.[14] Thus, the legislative history of the 1966 amendments, like that of the 1926 Act and the 1934 amendments, reflects the "steady congressional intent" to require binding adjustment of all railroad workplace disputes.

[14] Labor unions vigorously supported this amendment. As one union spokesman explained: "If the objectives of speedy, fair, and simplified handling and settlement of contract claims and grievances in this industry are to be achieved, it will be done by reducing to a minimum, rather than by expanding, the role of the courts in the field." *Railway Labor Act Amendments Relating to NRAB: Hearings on H.R. 701, H.R. 704 and H.R. 706 before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 262 (1965) (statement of Jesse Clark on behalf of Railway Labor Executives' Association).



### C. Numerous Decisions of This and Other Courts Recognize That Congress Intended That Adjustment Boards Have Exclusive Jurisdiction Over All Disputes Growing Out of the Employment Relationship.

In accordance with Congressional intent, this Court has repeatedly recognized that the minor dispute provisions of the RLA are mandatory and exclusive, and extend to all disputes arising out of the employment relationship. In *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972), the Court flatly rejected "the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses . . . ." Likewise, the Court has made clear that the category of minor disputes is a comprehensive one, and includes within it "the smaller differences which inevitably appear in the carrying out of major agreements and policies *or arise incidentally in the course of an employment.*" *Elgin, Joliet & Eastern Ry.*, 325 U.S. at 724 (emphasis added). Thus, the Court has held that the NRAB "was established as a tribunal to settle disputes *arising out of the relationship* between carrier and employee," and that "[t]he purpose of the Act is fulfilled *if the claim itself arises out of the employment relationship* which Congress regulated." *Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 551-52 (1959) (emphasis added). Indeed, in *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. at 326, the Court overruled *Moore* v. *Illinois Central R.R.*, 312 U.S. 630 (1941) and held that even a claim that employment was wrongfully terminated must be submitted to the NRAB; the Court thus eliminated the exception it had earlier created "to the otherwise mandatory

rule for the submission of disputes to the Board." 406 U.S. at 324.[15]

The Court has indicated that this broad interpretation of the scope of the NRAB's jurisdiction necessarily follows from the complex nature of labor-management relations in the railroad industry. The Court has taken "judicial notice of the fact that provisions in railroad collective bargaining agreements are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application." *Pennsylvania R.R.* v. *Day*, 360 U.S. at 553. Moreover, such collective bargaining agreements include only a small portion of the rules governing day-to-day working conditions on railroads: "[w]here a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than most others." *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142, 155 (1969) (footnote omitted).[16] Accordingly, the need to channel workplace disputes involving unwritten contractual "common law" to the adjustment boards created by the RLA is particularly great, since those boards are familiar with the background of custom and usage against which railroads act, and are therefore uniquely qualified to determine the scope of implicit rights and obligations that arise from those practices.

[15] Thus, contrary to the suggestion of one lower court, see *Lancaster* v. *Norfolk & Western Ry.*, 773 F.2d 807, 814 (7th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3717 (U.S. April 17, 1986), this Court has followed the broad reading of minor disputes given in *Elgin, Joliet & Eastern Ry.*, and has not held that such disputes are limited solely to contractual interpretation questions.

[16] See also *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 371 (1955) ("Both its history and the interests it governs show the Railway Labor Act to be unique. 'The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making.'") (quoting Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 568-69 (1937)).



The overwhelming majority of lower federal courts have likewise concluded that Congress intended the category of minor disputes to be interpreted broadly. Thus, it has been held that the adjustment boards have exclusive jurisdiction over claims that are "directly related to the employer-employee relationship,"[17] or that are " 'inextricably intertwined with the grievance machinery of the collective bargaining agreement and the R.L.A.,' "[18] or that are " 'arguably' governed by the collective bargaining agreement or . . . [have] a 'not obviously insubstantial' relationship to the labor contract."[19] Applying these broad formulations, numerous courts have held that the class of minor disputes encompasses all disputes arising out of the employment relationship, including claims such as intentional infliction of emotional distress, retaliatory discharge, and slander.[20]

**D. Respondent Buell's Claim Involves a Dispute Growing Out of His Employment Relationship, and As Such It Is Subject to the Exclusive Jurisdiction of the Railroad Adjustment Boards.**

The wrongs alleged by Mr. Buell in his complaint fall squarely within the class of workplace disputes that Con-

[17] *Adkins* v. *Chesapeake & Ohio Ry.*, No. 83-3488, Slip op. at 3 (S.D. W.Va. Feb. 11, 1985), Pet. App. 18a (dismissing plaintiff's FELA claim for mental distress arising from alleged harassment by his supervisor), *aff'd*, No. 85-1204 (4th Cir. Oct. 3, 1985), Pet. App. 16a, *petition for cert. filed*, 54 U.S.L.W. 3463 (U.S. Dec. 24, 1985).

[18] *Antalek* v. *Norfolk & Western Ry.*, No. 84-3057, Slip op. at 2 (6th Cir. Aug. 30, 1984), Pet. App. 22a (affirming dismissal of FELA claim for intentional emotional distress allegedly resulting from harassment by supervisors) (citation omitted).

[19] *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1369-70 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) (affirming dismissal of state law claim for emotional distress caused by alleged wrongful discharge and abuse of investigatory process) (collecting cases).

[20] See, *e.g.*, *Evans* v. *Missouri Pacific R.R.*, 618 F. Supp. 930, 932 (E.D. Mo. 1985) (collecting cases).

gress intended to be decided exclusively by the adjustment boards established by the RLA. The District Court stated that Mr. Buell made three major factual allegations: first, that he and his fellow carmen received inconsistent instructions from their supervisors concerning how car inspection reports were to be filled out; second, that he was required by his supervisor to assist in the allegedly illegal removal of property from a company yard; and third, that the railroad did not sufficiently discipline those fellow-workers who allegedly had ridiculed him. Pet. App. 9a-11a.[21] On their face, the acts or omissions complained of by Mr. Buell constitute grievances "founded upon some incident of the employment relation." *Elgin, Joliet & Eastern Ry.*, 325 U.S. at 723.[22] In order to resolve these claims, a court would be forced to decide questions concerning Mr. Buell's collective bargaining agreement and the railroad's customs and practices—the very type of questions that Congress intended to have decided by adjustment boards intimately familiar with the industry.[23] Indeed, that these complaints constitute classic minor disputes is indicated by the fact that Mr. Buell—along with several other carmen—enlisted the aid of union representatives to submit a written

[21] Mr. Buell also apparently claimed at his deposition that his supervisor had threatened to fire him. See Pet. Br. at 4. As petitioner points out, see *id.* at 17, such a claim must be decided by an adjustment board in light of this Court's holding in *Andrews*, 406 U.S. at 324.

[22] As the Court of Appeals below recognized, Mr. Buell complained only of "wholly mental injury stemming from his railroad employment . . . ." Pet. App. 2a.

[23] Among other issues, a court considering Mr. Buell's claims would have to determine (1) whether the instructions received by Mr. Buell were in fact inconsistent or instead were in accord with the railroad's custom and practice concerning the completion of car inspection reports; (2) whether under the railroad's rules or practices the removal of the property in question was in fact illegal; and (3) whether the discipline was inadequate in light of the customary standards of behavior in the workplace and the disciplinary actions permitted under the collective bargaining agreement.



grievance concerning the conduct of his supervisor. Pet. App. 10a.[24]

Numerous adjustment board decisions confirm that remedies are available under the RLA for the type of incidents of which Mr. Buell complains. Adjustment boards have repeatedly ruled that an employee may file a grievance claiming that he was given improper or inconsistent instructions, which is the gravamen of Mr. Buell's first two claims. The consistent rule announced by the adjustment boards is that, except where a risk of physical danger is presented, "if an employe considers an order improper or unreasonable, his proper course is nevertheless to comply with the order immediately and, if he desires, to contest it later through the orderly processes of the grievance machinery." NRAB Second Division Award No. 6910, at 2 (Aug. 15, 1975).[25] Thus, an employee who believes he has received an improper order may invoke "the orderly processes of the grievance machinery" and may obtain, if necessary, a final review of that order by an adjustment board.

Adjustment board decisions also demonstrate that Mr. Buell had a remedy for his claim that certain of his

[24] In response to that grievance, a representative of the railroad convened a meeting at which the complaints concerning the supervisor were aired. Pet. App. 10a. The union also submitted a letter of complaint regarding actions taken by the supervisor after that meeting. *Id.* The record does not indicate what further action, if any, was taken with regard to these complaints concerning Mr. Buell's supervisor. *Id.*

[25] See, *e.g.*, NRAB First Division Award No. 17398, at 2 (Feb. 24, 1956) ("The responsibility for the operation is the carrier's alone; and the remedy for an unauthorized instruction is performance and grievance, and not argument or refusal."); NRAB Second Division Award No. 1787, at 14-15 (June 28, 1954) ("employes must, as a general rule, carry out the orders given . . . and, if such orders are improper, seek redress under their contract in the manner provided for that purpose by The Railway Labor Act"); NRAB Third Division Award No. 16286, at 1 (May 10, 1968) (it was the employee's "duty to comply with instructions and thereafter seek a remedy through proper grievance channels for whatever rights he felt were violated").

fellow-workers had harassed him. An employee who is aggrieved by the conduct of his fellow-workers may complain to the railroad, which then may initiate disciplinary proceedings against the offending employee.[26] Adjustment boards have repeatedly upheld severe discipline, including discharge, meted out by railroads as sanctions for an employee's offensive conduct toward his fellow-workers.[27] These awards make clear that the adjustment boards are sensitive to, and available to correct, the types of harassment of which Mr. Buell complained. As the Third Division has stated in upholding a dismissal:

> "It is inherent in the work relationship that personnel must conform to certain well-known, commonly accepted standards of reasonable conduct while on the job. Published rules and regulations are not necessary to inform an employe that misconduct such as fighting or using vulgar language combined with threats may subject him to discipline or discharge. A railroad office is a place for the performance of work. While it is not a tearoom with a Chesterfieldian vocabulary, neither is it a place for barroom conduct." NRAB Third Division Award No. 21299, at 2 (Nov. 12, 1976).

Finally, adjustment board decisions indicate that an employee who claims to have been harassed or treated unjustly by a supervisor may pursue that complaint directly in the form of a grievance. The NRAB Third Division, for instance, held that it had jurisdiction over a claim by an employee who alleged that she had been harassed by a supervisor. NRAB Third Division Award No. 25533, at 2 (June 28, 1985) (finding jurisdiction, but holding that the claim was time-barred and procedurally defective). That Division also held, in the context of a disciplinary appeal, that if an employee felt that he was "being unjustly treated" in comparison with other employees, "his remedy lay within the grievance procedure": "Claimant's recourse was to do the work and file a grievance to redress the wrong, if he felt his supervisor's instructions were unfair or discriminatory. That is the whole purpose of the grievance procedure." NRAB Third Division Award No. 22157, at 2 (July 31, 1978).[28]

In sum, the adjustment boards do afford remedies for the type of conduct of which Mr. Buell complains. That the remedies provided under the RLA are not identical to those that might be available in court is irrelevant, for the RLA remedies are the ones Congress thought best-suited to resolve such disputes and to maintain industrial peace on the nation's railways. As the NRAB First

[26] See, *e.g.*, NRAB First Division Award No. 13574, at 1 (May 12, 1950) ("[h]ere, the [disciplinary] investigation was precipitated through charges placed against the claimant, not by carrier officials, but by fellow employes," who testified "that claimant threatened co-workers with bodily harm and physical violence"); NRAB Second Division Award No. 7451, at 2 (Jan. 24, 1978) ("Claimant is accused primarily of using vile and abusive language to a fellow employe," who reported this to his supervisor).

[27] See, *e.g.*, NRAB Second Division Award No. 7451, *supra*, at 2 (upholding a dismissal on the ground that "Carrier's operations are severely hampered by self-provoked dis-harmony among its employes; accusations and name-calling, if tolerated by the Carrier, can lead to far more serious consequences for the employes involved and thus for the Carrier"); NRAB Third Division Award No. 17515, at 2 (Oct. 3, 1969) (upholding dismissal of an employee who called her supervisor and fellow-employees a "bunch of jerks," and who screamed and pounded on a secretary's desk and called her a "bitch"); NRAB Third Division Award No. 22055, at 2 (May 12, 1978) (upholding dismissal where "Claimant's vitriolic outburst accompanied by physical threats precipitated an atmosphere of tension and volatility that unmistakably frightened and disconcerted his co-workers").

[28] In addition, the collective bargaining agreement may explicitly confer a right to raise claims of harassment, abuse, or unjust treatment, and under such circumstances, adjustment boards will review whether a railroad has disposed of the employee's claims in accordance with the agreement. See NRAB Second Division Award No. 9494, at 3 (May 25, 1983) (under collective bargaining agreement, employee who complained of harassment and abuse by railroad police was entitled to a written statement explaining the railroad's refusal to initiate an investigation); Public Law Board No. 2969, Award No. 6, at 2 (May 26, 1983) (under collective bargaining agreement, employee was entitled to a hearing on his claim that he was unjustly treated by being denied proper training).

Division has explained, in rejecting the claim that in some circumstances an employee has no redress for an improper instruction except to refuse to act:

> "There is redress for each violation. It may or may not be in money, but there is a remedy to correct the practice if it is wrong, even though it does not extend to a money damage. If the remedy for a violation is deemed to be inadequate, then a new contract provision should be negotiated, or a requested change made in the law by the Congress." NRAB First Division Award No. 16111, at 2 (Feb. 23, 1953).[29]

**II. This Case Does Not Present a Conflict Between the Railway Labor Act and the Federal Employers' Liability Act.**

This case does not involve a conflict between the RLA and the Federal Employers' Liability Act ("FELA"), 35 Stat. 65, as amended, 45 U.S.C. § 51 *et seq.* While the RLA and the FELA are both cast in expansive terms—the RLA applying to all "disputes" growing out of the employment relationship, and the FELA applying to any "injury" suffered by an employee as a result of the railroad's negligence—this case does not bring the two statutes into collision. This is so because the FELA was not intended to provide relief for purely psychological grievances like Mr. Buell's, where there has been neither physical contact nor physical injury. Even if there were conflict between the RLA and the FELA in this case, however, the FELA would have to yield, since the RLA is the later-enacted statute and the one specifically directed to disputes involving the employment relationship.

[29] A recent adjustment board decision is instructive in this regard. In Public Law Board No. 2908, Award No. 28 (May 1, 1986), an adjustment board considered the wrongful discharge claim of Mr. Antalek, whose FELA action arising out of the same facts had earlier been dismissed in *Antalek* v. *Norfolk & Western Ry.*, No. 84-3057 (6th Cir. Aug. 30, 1984), Pet. App. 22a. Mr. Antalek claimed that the railroad had unjustly disqualified him from service on psychiatric grounds, and he sought reinstatement, back pay, lost wages, and all losses sustained on account of his loss of health insurance. To decide this claim, the adjustment board ordered that a panel of three psychiatrists be agreed upon. Although the board ultimately concluded, on the basis of the psychiatric panel's finding, that the disqualification had not been unjust, their consideration of Mr. Antalek's claims indicates that adjustment board remedies are available.



The FELA was enacted in 1908.[30] It provides a cause of action in damages to any railroad employee "suffering injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such [railroad] carrier, or by reason of any defect or insufficiency, due to its negligence, in . . . track . . . or other equipment." 45 U.S.C. § 51. The primary purpose of the law was to amend, in the context of the railroad industry, the common law duty of the master to the servant. *Rogers* v. *Missouri Pacific R.R.*, 352 U.S. 500, 507 (1957); H.R. Rep. No. 1386, 60th Cong., 1st Sess. 1 (1908); S. Rep. No. 460, 60th Cong., 1st Sess. 1-3 (1908). The FELA abolished the common law fellow-servant doctrine, which barred employer liability to an injured employee for the negligence of a co-worker. It substantially restricted the doctrines of contributory negligence and assumption of risk. Finally, it prohibited enforcement of contracts that purported to waive employees' rights to damages. H.R. Rep. No. 1386, *supra*, at 1; S. Rep. No. 460, *supra*, at 1-3; see *Second Employers' Liability Cases*, 223 U.S. 1, 49-50 (1912).

Congress believed these particular departures from the common law to be necessary because of the especially

[30] The original Employers' Liability Act, 34 Stat. 232 (1906), was declared unconstitutional on the ground that it applied to intrastate as well as interstate commerce. *Employers' Liability Cases*, 207 U.S. 463 (1908). The version of the FELA passed in 1908 was substantially the same as the 1906 Act, except that its scope was limited to employees engaged in interstate commerce. S. Rep. No. 460, 60th Cong., 1st Sess. 1 (1908). See generally *Second Employers' Liability Cases*, 223 U.S. 1 (1912). Thus, the legislative histories of both the 1906 and 1908 Acts are relevant to a determination of Congressional intent.

hazardous nature of the railroad industry.[31] The dangers peculiar to this industry were assuredly not psychological, as the hearings on the original legislation make clear.[32] The 1908 House Report explained that the FELA was intended to "make the employer liable for injury caused by defects or insufficiencies in the roadbed, tracks, engines, machinery and other appliances used in the operation of railroads," H.R. Rep. No. 1386, *supra*, at 2; that is, Congress was concerned about injuries arising from physical hazards.[33] The FELA "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Wilkerson* v. *McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring). There is simply no indication in the legislative history that Congress intended in the FELA also to create a cause of action for purely psychological

[31] See, *e.g.*, S. Rep. No. 460, *supra*, 2-3 (rules for "a primitive state of society" are obsolete in the modern, complex railroad industry, where "workmen do their work in the constant presence of danger, where a single misstep is often fatal"). See generally Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160, 162-68 (1953).

[32] During those hearings, H.R. Fuller, testifying in support of the bill on behalf of the railroad workers' organizations, repeatedly emphasized the tremendous loss of "life and limb" in the railroad industry, and stated that the bill was designed to ensure compensation for the "man with an armless sleeve or wooden leg." *Liability of Employers: Hearings on H.R. 239 Before the Senate Comm. on Interstate Commerce*, 59th Cong., 1st Sess. 84, 158, 174 (1906). Similarly, Samuel Gompers, representing the American Federation of Labor, stated that "what we want is that the penalizing of these employers shall be sufficient warranty for them to take . . . precaution for the protection of life and limb. . . ." *Id.* at 78.

[33] In addition, the House Report repeatedly refers to the FELA's application to "personal injuries." See, *e.g.*, H.R. Rep. No. 1386, *supra*, at 1-3. While the term "personal injury" could have several meanings, it is apparent that the House Report was using the term as a substitute for "physical injury," for the minority report opposing the bill uses the two phrases interchangeably. See *id.* at 92; see also H.R. Rep. No. 2335, 59th Cong., 1st Sess. 2 (1906).



injury, where there has been neither physical contact nor physical injury.

It is true, of course, that Congress did not expressly limit the cause of action created by the FELA to injury that has a physical component. But it was not necessary to state such a limitation, given the common law meaning of the term "injury" at the time the FELA was enacted.[34] At that time, when a plaintiff made a "claim for mental suffering only . . . the long-recognized common law rule permitted no recovery; the decisions to this effect 'rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health or reputation.'" *Southern Express Co.* v. *Byers*, 240 U.S. 612, 615 (1916) (quoting Cooley on Torts, 3d Ed., 94). As the court explained in *Western Union Telegraph Co.* v. *Sklar*, 126 F. 295, 301 (6th Cir. 1903), "[d]amages for mental pain, grief, disappointment, etc., are recoverable at the common law only when the inseparable accompaniment and result of some bodily pain." See Bohlen, *Right to Recover for Injury Resulting From Negligence Without*

[34] In *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949), this Court stated that "the Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms." *Urie* held that the FELA permits a suit for occupational disease, not simply physical injury resulting from a sudden accident. While the Court stated in *Urie* that it would apply a "standard of liberal construction in order to accomplish" the Act's "humanitarian purposes," *id.* at 180, it nonetheless looked to the common law to determine Congress' understanding of the term "injury," and found that "at common law" the concept of "injury" did, in fact, include "'the incurring of a disease or harm to health.'" *Id.* at 182 (footnote omitted). Had it not, this "would [have] len[t] substance to the argument that Congress' use of the word 'injury' was less broad than the word's surface connotation indicates." *Id.* In contrast, as our review of the common law makes clear, at the time Congress enacted the FELA, the common law concept of "injury" did not include the incurring of purely emotional distress; and this strongly supports the conclusion that Congress did not intend to include such injury within the FELA.

*Impact*, 50 Am. L. Reg. (o.s.) 141, 151 (1902) ("Mere fright, mental suffering or nervous shock has never been, nor is now regarded by the courts as legal injury."). In fact, even today, the right to recover damages for purely emotional injuries is far from well-established at common law.[35]

In sum, the relevant legislative and legal history indicates that the FELA was not designed by Congress to deal with purely mental and emotional injuries.[36] In this case, Mr. Buell alleged "wholly mental injury" (Pet. App. 2a)—there is no allegation of physical injury or any wrongful physical contact or threat of such contact. Con-

[35] With regard to intentional torts, "[n]ot until comparatively recent decades has the infliction of mental distress served as the basis of an action, apart from any other tort." Prosser & Keeton on Torts § 12, at 55 (5th ed. 1984). And "[w]here the defendant's *negligence* causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, and in the absence of some other independent basis for tort liability, the great majority of courts still hold that in the ordinary case there can be no recovery." *Id.* § 54, at 361 (footnotes omitted) (emphasis added). Similarly, the Restatement (Second) of Torts § 436A (1965) declares that an actor whose negligent conduct results in "emotional disturbance alone, without bodily harm or other compensable damage . . . is not liable for such emotional disturbance." Moreover, the law remains unsettled as to the right to recover even where the emotional disturbance results in physical illness. See, *e.g.*, Prosser, *supra*, § 54, at 363; Restatement, *supra*, § 436A comment c.

[36] Nor is it necessary to read such a design into the FELA to accomplish its "humanitarian purposes." This Court has said that it is not bound by common law principles of *liability* when interpreting the FELA, since the Act is an "avowed departure" from those rules. *Sinkler* v. *Missouri Pacific R.R.*, 356 U.S. 326, 329 (1958); see also *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 431-32 (1958). But the Court's statement in this regard refers to those areas of the common law from which Congress did, in fact, expressly depart, *i.e.*, the common law rules regarding master and servant liability. There is no indication that Congress also meant to depart from the common law concept of compensable "injury," and thus the contemporaneous meaning of that concept is relevant in determining Congressional intent.



sequently, his claim is simply outside the scope of the FELA.[37]

In contrast, as we have shown above, Mr. Buell's claim falls squarely within the RLA, since it is a dispute growing out of his employment relationship with the railroad. See pp. 15-17 *supra*. Reading the FELA, as we do, to exclude claims such as Mr. Buell's avoids any conflict between the RLA and the FELA. This Court has repeatedly held that, where possible, Congressional enactments will be construed so as to reconcile their purposes. See, *e.g.*, *Watt* v. *Alaska*, 451 U.S. 259, 266-67 (1981); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).[38] Here, such a construction is possible, and fully in accord with Congressional intent.

Should, however, the Court rule that the FELA does cover Mr. Buell's claim, thus creating a conflict with the RLA, it is the RLA that would have to control. It is well-established that where there is a conflict between two federal laws, the provisions of the later statute—here the RLA—must be given effect. See 2A N. Singer, Sutherland on Statutes and Statutory Construction § 51.02 (rev. ed. 1984). In fact, the RLA in terms repealed "all Acts and parts of Acts in conflict with" its provisions.

[37] In contrast to the court below, most lower courts have concluded that the FELA does not create a cause of action where there has been no physical contact or threat of physical contact, see, *e.g.*, *Lancaster* v. *Norfolk & Western Ry.*, 773 F.2d 807, 813 (7th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3717 (U.S. April 17, 1986) (collecting cases), or where there has been no physical injury, see, *e.g.*, *Yawn* v. *Southern Ry.*, 591 F.2d 312, 317 (5th Cir.), *cert. denied*, 442 U.S. 934 (1979); *McSorley* v. *Consolidated Rail Corp.*, 581 F. Supp. 642, 644-45 (S.D.N.Y. 1984). The Court need not decide in this case whether the proper test for an FELA action is physical contact, physical injury, or both, since Mr. Buell has alleged neither.

[38] See *Brotherhood of Railroad Trainmen*, 353 U.S. at 40 (holding that "[t]here must be an accommodation" of the RLA and the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, "so that the obvious purpose in the enactment of each is preserved").

45 U.S.C. § 163. Furthermore, the RLA must prevail here for the additional reason that it is specifically directed to claims growing out of employment disputes, whereas the FELA deals with injuries arising more generally. See, *e.g.*, *Brotherhood of Railroad Trainmen*, 353 U.S. at 41-42 ("specific provisions" of RLA "take precedence over the more general provisions of the Norris-LaGuardia Act").

A contrary interpretation of the scope of the FELA would mean that any and all disputes arising out of the railroad employment relationship could be made the subject of an FELA action by the simple expedient of alleging that emotional injury had resulted therefrom. This would circumvent the statutory regime that Congress intended to handle such matters. Courts would be required to decide the very type of disputes that Congress believed were best decided by expert adjustment boards, which are "peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world . . . and [which] know[] the industry's language, customs, and practices." *Gunther* v. *San Diego & Arizona Eastern Ry.*, 382 U.S. 257, 261 (1965). See pp. 9-10 *supra*. This would increase the risk of erroneous decisions, and also would undercut the "desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems" achievable by adjustment board decisions. *Slocum* v. *Delaware, Lackawanna & Western R.R.*, 339 U.S. 239, 243 (1950). Moreover, allowing such disputes to be litigated under the FELA would disregard the Congressional judgment that the adjustment process was the method of dispute-resolution most likely to lead to industrial peace. See p. 10 *supra*. Finally, of course, permitting these disputes to be treated as FELA claims would place an additional burden on the already overtaxed federal judiciary; the heavy workload of the courts would be significantly increased if even only a small percentage of the thousands of grievances filed by employees every year were to be brought as FELA actions in federal courts.



### III. Federal Law Preempts State Tort Law Remedies for Disputes Arising Out of the Railroad Employment Relationship.

We have shown that, in enacting the RLA, Congress meant to establish the exclusive avenue for resolution of disputes arising out of the employment relationship between a railroad and its employees. We have shown in addition that this statutory scheme does not conflict with the FELA in this case, and that even if it did conflict the RLA must control. The FELA, however, is not the only avenue by which plaintiffs have sought to circumvent the RLA. Instead, with increasing frequency, railroad employees have attempted to avoid the RLA adjustment process by invoking state tort law. Thus, while in a strict sense this case involves simply the interrelationship of the RLA and the FELA, the scope the Court affords the RLA will have an important bearing on its relationship to state law as well. As we show in this section, the RLA necessarily preempts state tort law remedies for railroad employment disputes; moreover, even if the Court disagrees with our view as to the scope of the RLA *vis-a-vis* the FELA, it would still be the case that the RLA and the FELA together occupy the field, to the exclusion of state tort law.[39]

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[39] Three state supreme courts are currently considering appeals from lower court holdings that the RLA does not preempt state tort law remedies. See *Brown* v. *Missouri Pacific R.R.*, No. 822-00505 (St. Louis City Cir. Ct.), *appeal transferred to Mo. Sup. Ct.*, No. 50528 (Mo. App. June 24, 1986); *DeTomaso* v. *Pan American World Airways, Inc.*, 174 Cal. App. 3d 1170 (Cal. App. 1985), *appeal pending*, 714 P.2d 1239 (1986); *Gulati* v. *Burlington Northern R.R.*, 364 N.W.2d 446 (Minn. App.), *review granted*, No. C7-84-1333 (Minn. May 24, 1985). These lower state court rulings are against the great weight of authority holding that the RLA does preempt such remedies. See, *e.g.*, *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. at 322; *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425, 428-29 (9th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d at 1368-70; *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045, 1048-54 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Choate* v. *Louisville & Nashville R.R.*, 715 F.2d 369, 370-72 (7th Cir. 1983); *Koehler* v. *Illinois Central Gulf R.R.*, 488 N.E.2d 542, 545-46 (Ill. 1985), *cert. denied*, 54 U.S.L.W. 3855 (U.S. June 30, 1986).

Last term, this Court observed that "[p]re-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law . . . , where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law . . . , or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Louisiana Public Service Commission* v. *FCC*, No. 84-871, 54 U.S.L.W. 4505, 4509 (U.S. May 27, 1986). Each of these " 'varieties' of preemption," *id.*, is present in this context. This Court has found in the RLA "a denial of power in any court—*state as well as federal*—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." *Slocum*, 339 U.S. at 244 (emphasis added). This is clear not only from the language of the statute, which we have shown above to be mandatory and exclusive, see pp. 4-7 *supra*, but also from the comprehensive nature of Congress' regulation in this field. As this Court has observed, the RLA's "framework for fostering voluntary adjustments between the carriers and their employees . . . has no statutory parallel in other industry. That machinery, the product of a long legislative evolution, is more complex than that of any other industry." *IAM* v. *Street*, 367 U.S. at 755.[40] The RLA simply leaves no room

[40] It follows from this that the RLA preempts state tort law more broadly than does the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* In *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 304 (1977), this Court held that the NLRA did not preempt a union member's state tort claim against the union for intentional infliction of emotional distress, since in that case the Court concluded that the "potential for interference [with the scheme of the NLRA] is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." In contrast, in the RLA context, the State's interest in protecting its citizens is less weighty because, as shown in Part I above, the RLA provides a forum in which employees may obtain relief for workplace disputes; and the potential for interference with the federal scheme is far greater, since the RLA establishes a much more comprehensive adjustment system than does the NLRA. As this Court has recognized, "[t]he fundamental premises



for states to supplement this comprehensive adjustment process through the creation of parallel state tort law remedies for employment disputes.[41]

In addition, recognition of state tort law remedies for railroad employment disputes would stand as an obstacle to the accomplishment and execution of the full objectives of Congress. Such state law suits would subvert the RLA in the same ways as would FELA claims arising out of employment disputes: they would remove these workplace controversies from the adjustment boards Congress thought best-suited to decide them. The wide variety in state laws also would lead to inconsistencies in an area in which "the needs of the subject matter manifestly call for uniformity"; as this Court has recognized, the "validity, interpretation, and enforceability [of RLA contracts] cannot be left to the laws of the many States . . . ." *IAM* v. *Central Airlines*, 372 U.S. at 691-92 (footnote omitted). Moreover, state tort suits could result in massive punitive damage awards, which are not available under the FELA. See, *e.g.*, *Kopczynski* v. *The Jacqueline*, 742 F.2d 555, 560 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2677 (1985). Such damage awards would pose a potential threat to railroad operations, contrary to the purpose of the RLA "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a.

and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act," *Brotherhood of Railroad Trainmen*, 353 U.S. at 31 n.2, and the "compulsory character of the administrative remedy provided by the RLA" is "if anything stronger" than that arising by virtue of the NLRA. *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. at 323.

[41] Nor is *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines*, 372 U.S. 714 (1963), to the contrary. In that case, the Court held only that the RLA did not preempt a Colorado law prohibiting discrimination in hiring. *Id.* at 724. No claim could have been made in that case that the RLA provided an adequate adjustment remedy for petitioner, who was allegedly denied employment on the basis of race. Thus, that case did not present the preemption question involved here.

In sum, then, Congress intended that disputes arising out of the railroad employment relationship should be decided by RLA adjustment boards, not by courts hearing FELA claims or state tort actions. Moreover, even should this Court hold, contrary to the position urged by *amicus* here, that Mr. Buell's claim falls within the scope of the FELA and can be pursued under that statute notwithstanding the RLA, there would still be no room for state law claims. It is well established that, where it applies, the FELA preempts state regulation.[42] Thus, regardless of how the RLA and the FELA are accommodated with respect to each other, they together leave no role for claims under state tort law.

## CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: July 18, 1986

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[42] See, *e.g.*, *Second Employers' Liability Cases*, 223 U.S. at 53-55; *Janelle* v. *Seaboard Coast Line R.R.*, 524 F.2d 1259, 1261 (5th Cir. 1975); H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908) (FELA will "supplant" state statutes and create "uniformity").

# AMICUS CURIAE

# BRIEF

SEP 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1140

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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ATCHISON, TOPEKA AND SANTE FE RAILWAY COMPANY,
*Petitioner*,

v.

JIM BUELL,
*Respondent*.

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**On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO) AND FOR THE RAILWAY LABOR EXECUTIVES ASSOCIATION (RLEA) AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO) AND FOR THE RAILWAY LABOR EXECUTIVES ASSOCIATION (RLEA) AS AMICI CURIAE IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 93 national and international labor organizations, having a total membership of approximately 13,000,000 working men and women. Many of the employees represented by AFL-CIO unions work in the railroad industry.

The Railway Labor Executives' Association (RLEA) is an unincorporated association, headquartered in Washington, D.C., whose membership consists of all the railway labor unions in the country, representing all of the crafts of railroad employees.

This case raises questions concerning two important laws covering railroad employees, the Federal Employers' Liability Act and the Railway Labor Act. Because the resolution of the issue in this case will determine the nature and extent of the recovery by railroad employees for injuries incurred in the workplace, the case is a matter of great importance to the members of the unions affiliated with the AFL-CIO and the RLEA. This brief *amici curiae* which addresses those issues is filed by the AFL-CIO and the RLEA with the consent of the parties as provided in the Rules of this Court.

### ARGUMENT

#### Introduction and Summary

Petitioner Atchison, Topeka and Santa Fe Railway Company ("petitioner" or "Santa Fe") has chosen to present to this Court a single question:

> Whether a claim is actionable under the [Federal Employers' Liability Act] FELA, where the alleged source of such injuries was a workplace dispute subject to mandatory grievance procedures which had

been initiated pursuant to the [Railway Labor Act] RLA. [Brief for Petitioner ("Pet. Br.") at (i).] [1]

Before turning to, and rebutting, petitioner's reasons as to why that question should be decided in its favor, it may be helpful to step back for a moment from the particulars of the legal arguments presented to examine from a broader perspective the reach, if accepted, of the general proposition that petitioner advances.

Whatever the precise scope of the FELA, it is clear that the statute covers at least traditional tort suits for personal physical injuries due to negligence, or due to

[1] The Question Presented in the Petition for Certiorari ("Cert. Pet.") was different in one significant way. At that time, petitioner presented the case as involving:

> Whether the court of appeals erred in holding that a claim *solely for emotional injuries* is actionable under the FELA, where the alleged source of such injuries was a workplace dispute subject to mandatory grievance procedures which had been initiated pursuant to the RLA. [Cert. Pet. (i)_ (emphasis supplied).]

The Court of Appeals did decide the question of whether the FELA reaches purely emotional injuries. Petitioner now apparently agrees with the respondent, however, that the question whether the FELA provides a remedy for a purely emotional injury is not fairly before this Court, and should not be decided. *Cf. Fountain v. Filson*, 336 U.S. 681 (1949).

Further, in arguing in favor of a limitation upon the "source" of injuries compensable under the FELA, petitioner does not make any substantial independent argument concerning the language, history, or judicial interpretation of the FELA. Instead, in its extremely sketchy discussion of the question whether the FELA reaches emotional injuries deriving from "a workplace dispute," petitioner relies principally upon the same premises regarding the reach of the RLA and its interaction with the FELA that underlie its much more extensive argument that the RLA provides the exclusive remedy for the dispute here. *See* Pet. Br., at 29-30; *compare id.*, at 11-25.

Under these circumstances, we believe that the Court should not decide the legal question whether the FELA, considered independently, covers purely emotional injuries. However, since the Court of Appeals did address the problem, we briefly discuss the issue at pp. 28-30 of this brief.



violations of statutory safety standards regardless of negligence. *E.g., Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). And all such suits necessarily involve a "workplace dispute": the employee claims that due to an injury suffered at the workplace, he or she has been harmed, and that the employer should pay for that harm "because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered" (*Sinkler v. Missouri Pacific RR Co.*, 356 U.S. 326, 330 (1958)); the employer on the other hand refuses to pay for the employee's injuries, and it is because of that refusal that suit is filed. If there were no dispute between the employee and the employer there would be no lawsuit, and if it were not a "workplace dispute" there would be no FELA jurisdiction. *See* §§ 1, 2 of the FELA, 45 U.S.C. §§ 51, 52.

Furthermore, many—perhaps most—of these most traditional FELA cases could be recast to fit precisely the same mold into which petitioner seeks to pour this case. Thus, the employer here claims that because the employee here could have filed a grievance over the actions of the supervisor which the employee claims caused his injury, and could have pursued that grievance through the RLA-mandated system that culminates in a Railroad Adjustment Board decision, he was obligated to do so, and to forego bringing an FELA damages suit in court. But the acts of negligence and the safety violations that cause the personal physical injuries traditionally actionable through the FELA are arbitrable as well: Issues concerning workplace safety are often the cause of workplace disputes, and are commonly covered by, and grievable under, collective bargaining agreements. Indeed, this Court held in *Gateway Coal v. United Mine Workers*, 414 U.S. 368 (1974), that even though under the NLRA—unlike the RLA—"[n]o obligation to arbitrate a labor dispute arises solely by operation of law" (*id.* at 374),

the usual " 'presumption' of arbitrability" . . . applies to safety disputes," (*id.* at 380). As the *Gateway Coal* Court commented:

> Certainly industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects, with the same unhappy consequences of lost pay, curtailed production, and economic instability. Moreover, the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important to the one case as to the other, and the need to consider such factors as productivity and worker morale is as readily apparent. [414 U.S. at 379.] [2]

Thus, petitioner does not point to any viable distinction between this case and the personal physical injury cases traditionally covered by the FELA: One cannot separate this case from the personal physical injury cases traditionally covered by the FELA on the ground that this case necessarily involves a "workplace dispute" while the physical injury cases do not, or on the basis that the dispute in this case is subject to the RLA-grievance-arbitration system while a dispute occasioned by a physical injury case necessarily is not. And, as the personal physical injury cases show, there is no bright line between the disputes cognizable under the FELA and those to which the RLA dispute resolution scheme applies; although, in many instances, correction of the conditions giving rise to the physical injury may be grievable, the damages due to the injury caused by the unsafe condition have always been thought to be recoverable under the FELA.

In short, the proposition petitioner seeks to establish—that workplace disputes covered by an RLA-mandated grievance system are not subject to the FELA—is either

[2] Furthermore, those disputes often involve—as did the one in *Gateway Coal*—controversies concerning the orders or other actions of supervisors. In *Gateway Coal*, the controversy was over "the alleged safety hazard created by the presence of . . . two foremen in the mines." 414 U.S. at 372.



true for, and applies to, *all FELA cases* across the board (and not only to some subspecies of such cases), or that proposition must be rejected as false. In reality, then, petitioner's contentions rest on the assertion that when Congress passed the RLA in 1926, the Legislature either repealed, or fundamentally altered, the 1906 FELA (by replacing jury trials in federal and state courts with RLA-mandated grievance and arbitration procedures).[3] Apparently, petitioner's suggestion is that in the sixty years of jurisprudence under the FELA since 1926, this critical impact of the RLA upon the rights protected by the FELA has simply been overlooked. "[U]nless it can be said that because a doctrine has been universally recognized as being beyond dispute and has hence hitherto in every case . . . been accepted . . . , it has by that fact alone now become a fit subject for dispute," (*Virginia v. West Virginia*, 246 U.S. 565, 592 (1918)), the inherent implausibility of this suggestion ought to be sufficient to require its rejection.

Not surprisingly, the legal arguments petitioner offers on behalf of its position fare no better on close examination than when viewed from this broader perspective.

I. Petitioner's first contention, upon which much of the remainder rests, is that the RLA commands that all em-

[3] We do not understand petitioner to be arguing that the Railroad Adjustment Board is empowered to enforce the statutory rights created by the FELA. Instead, its contention appears to be that where a FELA case fits the definition of a "minor dispute" under the RLA, all statutory rights evaporate, and the employee has a right only to whatever remedy the Railroad Adjustment Board—acting with such guidance as the collective bargaining agreement may provide and without any guidance where the collective bargaining agreement is silent—may choose to provide. Further, petitioner and the *amici curiae* appearing on its behalf admit that generally employees must continue working under the very conditions the employees contend are dangerous unless and until an order is issued correcting those conditions; under petitioner's theory any injuries that occur while the process is underway appear to be noncompensable. *See* Pet. Br. at 18-19; Brief of the National Railway Labor Conference as Amicus Curiae in Support of Petitioner (Labor Conf. Br.) at 15-20.

ployment-related disputes, and not only those involving in some way a collective bargaining agreement are subject to the mandatory and exclusive grievance-arbitration procedures of the RLA. This contention is based upon a *dictum* in *Elgin, Joliet & Eastern RR v. Burley*, 325 U.S. 711 (1945), which, if good law, would make *every* FELA case a minor dispute under the RLA. *Burley*, however, was decided on the premise that use of the RLA minor disputes resolution scheme is *optional*. As this Court gradually rejected that premise in favor of a mandatory and exclusive RLA minor disputes resolution scheme, its decisions made clear that the RLA system applies to contract-related disputes specifically, and not to workplace disagreements generally. Such was the clear import, in particular, of *Andrews v. Louisville & Nashville RR Co.*, 406 U.S. 320 (1972). The legislative history of the RLA moreover fully supports the conclusion that Congress intended only to make it clear that all disputes with a contractual nexus are covered by the RLA disputes resolution system.

II. Petitioner maintains also that there is a sufficient contractual nexus in the present dispute to permit the filing of a grievance concerning respondent's injuries. We may assume that petitioner is correct in this regard, for that assumption does not alter the result. Even if respondent had a Railroad Adjustment Board remedy available, that would not demonstrate, as petitioner suggests, a conflict between the RLA and the FELA sufficient to support a repeal by implication of some or all of the FELA. To the contrary, such repeals are disfavored generally; and, in the context of overlapping contractual and statutory remedies in the employment context, this Court has consistently held that such remedies comfortably coexist, given the collective nature of the one and the individual nature of the other. Since there is absolutely nothing in the legislative history of the RLA to suggest otherwise, the remarkable contention that, unbeknownst to this Court for the last sixty years, Congress in 1926 silently removed or fundamentally re-



stricted the critical protections afforded individual employees by the FELA must be rejected.

Similarly without validity is any contention that the FELA and the RLA should be "harmonized" by establishing an exhaustion or election of remedies requirement for some or all FELA claims. Again, this Court has consistently—beginning with an RLA case, *McKinney v. Missouri-Kansas-Texas RR Co.*, 357 U.S. 265 (1958)—rejected all suggestions that federal statutory rights conferred upon employees should be limited due to the availability of arbitral remedies. There is no reason to treat the rights created by the FELA differently; those rights are expressly nonwaivable and, moreover, include as a "goodly portion of the relief which Congress afforded" the "benefit of a jury trial." *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943).

III. Finally, considered without regard to the RLA, the FELA provides a cause of action for all personal injuries whether or not the injury is caused by physical contact or manifested through physical symptoms. This Court's cases establish (1) that the concept of "injury" under the FELA is not limited to the personal physical injuries Congress focused on in passing the statute and (2) that evolving tort standards rather than the state of the common law in 1906 is the appropriate guide in applying the FELA. Against that background there is no basis for implying into the broad language of the FELA an exclusion for emotional injuries.

**I. The Railway Labor Act Gives Railroad Adjustment Boards Exclusive Jurisdiction Only Over Disputes Between a Railroad and Its Employees Concerning Application or Interpretation of Collective Bargaining Agreements.**

Both petitioner and the *amici curiae* appearing on its behalf base much of their analysis upon one critical—and fundamentally erroneous—premise. That premise is that the RLA mandates an exclusive nonjudicial remedy both for cases involving the application or interpretation of collective bargaining agreements *and* for "any employ-

ment dispute not covered by the agreement." Pet. Br. at 11. *See also id.* at 13-14; *id.* at 19 ("the RLA extends not only to claims arising out of the bargaining agreement but also to claims 'founded upon some incident of the employment relation . . . independent of those covered by the collective agreement' "); Brief for Association of American Railroads and National Association of Railroad Trial Counsel as Amici Curiae in Support of Petitioner at 6 (the Ninth Circuit erred in holding that "a 'minor dispute' is one which must be related to the collective bargaining agreement or arguably governed by its provisions . . . . [A]n employee's grievance growing out of his daily working conditions, even if not directly involving the interpretation or application of a collective bargaining agreement, is nevertheless a 'minor dispute' under the RLA"); Brief of the National Railway Labor Conference as Amicus Curiae in Support of Petitioner at 4-5 ("all disputes arising out of the employment relationship between a railroad and its employees . . . [are] minor disputes . . . not . . . simply . . . claims 'growing out of' the 'interpretation or application of' collective bargaining agreements"); *see generally id.* at 4-20.

Both this Court's cases and the legislative history of the RLA conclusively demonstrate that this thesis about the scope of exclusive RLA jurisdiction is simply wrong.

A. In arguing that under the RLA *all* employer-employee disputes must be resolved through the arbitration system that statute requires the parties to establish, petitioner and its *amici curiae* rely heavily upon language in this Court's decision in *Elgin, Joliet & Eastern RR v. Burley*, 325 U.S. 711 (1945). In a portion of the *Burley* opinion—accurately labelled "a dictum" in *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 814 (7th Cir., 1985)—this Court characterized a "minor" dispute under the RLA as a disagreement that

> relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case [, that is,] . . . . a claim founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. [325 U.S., at 723.] [4]



As Judge Posner noted in *Lancaster*, "If this dictum were an accurate statement of the law, . . . all personal injury claims by railroad workers against their employers would be within the exclusive jurisdiction of the arbitration tribunals set up under the Railway Labor Act—something no one believes." *Lancaster, supra*, 773 F.2d at 814. To determine *why* "no one [except the employer in this case] believes" that "claims on account of personal injury"—which, of course, would include every FELA case—must be arbitrated under the RLA, some historical perspective is useful.

*Burley* was based on the understanding that the RLA grievance-arbitration procedures are optional, rather than exclusive. Such was the express holding of a case decided only four years before *Burley*. *Moore v. Illinois Cent. R. Co.*, 312 U.S. 630 (1941).[5] As Professor Feller has explained,

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[4] The reason this portion of *Burley* is "*dictum*" is that it appears in a part of the opinion describing generally the difference between the treatment of "minor" and "major" disputes under the Act. There was no issue in *Burley* concerning whether the case before the Court concerned a "major" or "minor" dispute; the *Burley* disagreement was clearly a minor dispute, and the questions before the Court concerned only how minor disputes are properly handled under the RLA. Further, the indisputably minor dispute in question plainly did involve the interpretation of the applicable collective bargaining agreement. There was therefore no reason on the facts of the case to address the question whether there would have been a "minor" dispute within the meaning of the RLA had no contractual interpretation question been involved.

[5] The Court in *Moore* noted that the language of the 1934 Act was permissive, and stated that

> neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling

*Burley* . . . confirmed with emphasis the assumption in *Moore* that a collective agreement constituted a contract enforceable by individual employees without regard to the procedures of the Adjustment Board . . . . *Burley* is usually regarded as dealing with the question of whether a union can, without authorization, settle the accrued monetary claims of employees under a collective agreement . . . . Actually, the case involved that question only indirectly . . . . [T]he Court held that in the absence of a showing that the employees had authorized the union to act for them . . . [the Adjustment Board's] result did not bind them. Neither the majority nor the dissenters even raised the question . . . whether the plaintiffs had any business in court at all . . . . [Rather] [b]oth sides assumed that . . . the claims themselves, assuming them to be unsettled, were adjudicable in the courts rather than before the Board. [Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 680-81 (1971).]

Given the permissive system that *Moore* and *Burley* posited, the assumption that the RLA allowed—but did not require—arbitration of *all* employer-employee disputes, including personal injury claims, had no major impact upon the right of individual employees to pursue individual judicial remedies. As long as employees were not required to bring *any* dispute before the RLA-mandated arbitrators, a holding that a certain kind of controversy *could* be decided by the RLA dispute resolution system simply expanded the *fora* available for adjudication of the rights of individual employees without affecting the availability of other state or federal remedies.

Consistent with this vision of the optional nature of RLA arbitration procedures, and despite the broad language of *Burley* regarding the scope of the minor disputes provisions, under *Moore* and *Burley* this Court without exception viewed the RLA scheme as one that coexists with noncontractual remedial schemes applicable to employment-related railroad and airline disputes. For example, in *Terminal Association of St. Louis v. Brotherhood of RR Trainmen*, 318 U.S. 1 (1943), the question was whether the RLA prevented a state agency from requiring cabooses on trains for reasons relating to the safety of railroad employees. The Court assumed that the RLA-mandated Adjustment Board would have had jurisdiction of a grievance concerning whether or not cabooses should be provided. Nonetheless, the Court rejected the argument that the RLA remedy was exclusive, and held instead "that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves." *Id.* at 7. Similarly, the Court in *McKinney v. Missouri-Kansas-Texas RR Co., supra*, 357 U.S. 265, decided that there is no need to exhaust RLA remedies with regard to rights protected by federal veterans' acts. *See also Colorado Anti-Discrimination Commission v. Continental Airlines*, 372 U.S. 714 (1963) (holding that the RLA permits a state court remedy for employment discrimination); *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific RR Co.*, 382 U.S. 423 (1966).

Nor did this Court in the period after *Burley* ever put into question the general understanding that "claims on account of personal injury" brought under the FELA could go forward in federal or state court, rather than before the Railroad Adjustment Board. To the contrary, it was during this era that the Court decided that "the right to trial by jury is . . . a substantial part of the rights accorded by the FELA" (*Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952)), a proposition plainly inconsistent with any rule requiring adjudication before the Railroad Adjustment Board.

During that same period, however, the Court in a long series of cases decisively moved away from the *Moore-Burley* voluntary arbitration doctrine *where rights*

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disputes was based on a philosophy of legal compulsion. . . . [P]etitioner was not required by the [RLA] to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge. [312 U.S. at 635-36.]

*created by a collective bargaining agreement were at the core of the dispute. See* Feller, *A General Theory of the Collective Bargaining Agreement, supra*, 61 Calif. L. Rev. at 682-686; 692-700. In those cases, the Court gradually developed the rule that the RLA-mandated dispute resolution system is entrusted with the fundamental responsibility for determining disputes concerning contract-based rights.

For example, in *Order of Railway Conductors v. Pitney* 326 U.S. 561 (1946), the Court held that a union could not litigate in a federal bankruptcy court its dispute with a debtor railroad, where "to settle that dispute the reorganization court would have to act in the . . . capacity of a tribunal empowered to grant the equitable relief sought, even though granting that relief requires interpretation of these [collective bargaining] contracts." *Id.* at 565. The Court reasoned that:

> Congress has specifically provided *for a tribunal to interpret contracts such as these* in order finally to settle a labor dispute. . . . Not only has Congress . . . designated an agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases . . . it also intended to leave a minimum responsibility to the courts. . . . [The] interpretation of these contracts involves more than the mere construction of a "document" in terms of the ordinary meaning of words and their positions. . . . [Since] all parties seek to support their particular interpretations of these agreements by evidence as to usage, practice and custom that . . . must be taken into account and properly understood. . . . *[a]n agency especially competent and specifically designated to deal with [this contract interpretation question] has been created by Congress.* Under these circumstances, the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. [326 U.S. at 565-66 (emphasis supplied).]

On the basis of *Pitney* and its reasoning, the Court in *Slocum v. Delaware, L. & W.R. Co.* (1950) 339 U.S. 239,



greatly limited *Moore's* holding that RLA remedies for minor disputes are generally optional. Now characterizing the RLA dispute resolution mechanisms as covering "disputes concerning the making of agreements and . . . grievances *arising under existing agreements*" (339 U.S. at 242, emphasis supplied), the Court relied on both the expertise and uniformity rationales as bases for its "holding that the jurisdiction of the [Adjustment] Board to adjust grievances and disputes *of the type here involved* is exclusive" (*id.* at 244, emphasis supplied)[6]:

> In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties. . . . The Act . . . represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes *growing out of the interpretation of existing agreements.* The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems. . . . *This reasoning* . . . supports the denial of power in any court—state as well as federal—to invade the jurisdiction conferred

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[6] *Slocum* distinguished *Moore* on a narrow basis nowhere apparent in the *Moore* opinion itself: Because the employee in *Moore* "chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee," said the *Slocum* Court, *Moore* did not involve future relations between the railroad and its employees, and any interpretation of the collective bargaining agreement made in adjudicating the case would not bind the Adjustment Board in subsequent arbitrations. 339 U.S. at 244. *See also Transcontinental & Western Air v. Koppal*, 345 U.S. 653 (1953); *Walker v. Southern Ry. Co.*, 385 U.S. 196 (1966).

on the Adjustment Board by the Railway Labor Act. [339 U.S. at 242-44 (emphasis supplied).] [7]

It was not until 1972, however, that this Court finally revisited the precise question decided in *Moore* and assumed in *Burley*. This time, the Court, "necessarily overruling *Moore v. Illinois Central R. Co.*," concluded that "the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." *Andrews v. Louisville & Nashville RR Co.*, *supra*, 406 U.S. at 322, 326. At the same time, however, the *Andrews* Court made clear that the obligatory RLA dispute resolution system is limited to disputes over contractually-based rights:

> Petitioner argues that his election to sever his connection with the employer and treat the latter's alleged breach of the employment contract as a "discharge" renders his claim sufficiently different from the normal disputes over the interpretation of a collective bargaining agreement to warrant carving out an exception to the otherwise mandatory rule for the submission of disputes to the Board. But the very concept of "wrongful discharge" implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will. *Here it is conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a "wrongful" one is the collective bargaining agreement between the employer and the union.* Respondent in this case vigorously disputes any intent on its part to discharge petitioner, and the pleadings indicate that the disagreement turns on the extent of respondent's obligation to restore petitioner to his regular duties following injury in an automobile accident. *The existence and extent of such an obligation in a case such as this will depend on the interpretation of the collective bargaining agreement. Thus petitioner's claim, and respondent's disallowance of it, stem from differing interpretations of the collective-bargaining agreement.* The fact that petitioner intends to hereafter seek employment elsewhere does not make his present claim against his employer any the less a dispute as to the interpretation of a collective bargaining agreement. His claim is *therefore* subject to the Act's requirement that it be submitted to the Board for adjustment. [406 U.S. at 324, emphasis supplied.]

The emphasis *Andrews* placed on the nexus between the claim in that case and the collective bargaining agreement confirms that while the Court by the time of *Andrews* had rejected the *Burley* vision of an optional all-purpose dispute resolution system under the RLA, the Court had done so in favor of a system *exclusive only with respect to disputes arising from a collective bargaining agreement.*

[7] *See also Brotherhood of RR Trainmen v. Howard*, 343 U.S. 768, 774 (1952) (permitting under the RLA itself a judicial remedy to enforce the right of black employees not to be discriminated against on the basis of race because "[t]he claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board"); *Brotherhood of Railroad Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 38 (1957) (quoting legislative history indicating that the railroad unions agreed to support the RLA on the understanding that "in respect to these minor-grievance cases that grow out of the interpretation and/or application of the contracts already made . . . they can very well permit those disputes to be decided . . . by an adjustment board"); *Pennsylvania RR Co. v. Day*, 360 U.S. 548, 551-53 (1959) (holding that *Slocum* applies where the grieving employee has retired, and stressing that "[a]ll the considerations which led Congress to entrust an expert administrative board with the interpretation of collective bargaining agreements are equally applicable . . . here. . . . The same collective bargaining agreement must be construed with the same need for uniformity of interpretation . . . [especially because] provisions in railroad collective bargaining agreements are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application"); *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257, 261-62 (1965).

B. Petitioner and the *amici curiae* appearing on its behalf emphasize that the RLA describes the mandatory dispute resolution mechanism as covering controversies "growing out of grievances *or* out of the interpretation or application of agreements," (45 U.S.C. § 153 First (i) (emphasis added)), and suggest that the use of the disjunctive confirms that the exclusive, mandatory RLA grievance-arbitration system applies to employment-related disputes *not* involving collective bargaining agreements. As we have already seen, however, the line of cases culminating in *Andrews*, *supra*, is based on a directly contrary view. And while this Court has not had occasion in those cases to explain why *Andrews* accords with the statutory language, the legislative history of the minor disputes provisions does provide that explanation.

Judge Posner in *Lancaster*, *supra*, provided a straightforward and sensible construction of the RLA's minor disputes language:

> [While this language] seems to say that more than contract interpretation is covered . . . . [a] "grievance" *is* a claim of violation of the collective bargaining agreement. Congress had no intention of making a grievance a separate basis for arbitration from disputes over the interpretation or application of the collective bargaining contract . . . . [C]ases make clear that a grievance is a dispute over rights created by the collective bargaining agreement. *See, e.g., Brotherhood of R.R. Trainmen v. Chicago River & Indiana RR*, *supra*, 353 U.S. at 33 . . . ., *Chicago & Northwestern Transport. Co. v. United Transportation Union* 656 F.2d 274, 278 (7th Cir. 1981); *Atchison, Topeka & Santa Fe Ry. v. United Transportation Union*, 734 F.2d 317, 321 (7th Cir. 1984). [773 F.2d at 814 (emphasis supplied).]

The legislative history of the RLA fully supports the hypothesis that a "grievance" is a particular kind of dispute concerning contractual rights that Congress wished to be sure were covered, rather than a distinct category of cases having nothing to do with the collective bargaining agreement and including workplace disputes generally, and personal injury cases particularly.



The RLA minor disputes language originated in §§ 2, Fourth and 3, First (c) of the 1926 version of that Act. Committee on Labor and Public Welfare, *Legislative History of the Railway Labor Act As Amended* (*Leg. Hist.*), at 4-5. The references to the minor disputes provisions in the 1926 reports basically repeat the statutory language. *Leg. Hist.* at 3 (H.R. Rep. No. 328, 69th Cong. 1st Sess); *id.* at 100, 101 (S. Rep. No. 606, 69th Cong. 1st Sess.). The comments made on the floor by proponents of the bill, however, make clear that the "grievances" covered by the statutory arbitration system are not all employee-employer disputes, but *only* those involving application of collective bargaining agreements negotiated under the Act.

For example, Representative Barkley, a leading proponent of the bill and a member of the Committee that reported it, twice explained that in railroad parlance, incorporated in the bill, a "grievance" is not a dispute divorced from contractual issues, but a particular kind of contractual dispute:

> There are two sorts of disputes that arise on railroads. One kind is a dispute growing out of the interpretation of agreements as to wage scales or working conditions that already exist. *These disputes might be termed grievances;* they might affect a large number of men in some way and they might affect only a small number of men, or they might affect a single individual. . . . [The adjustment boards established during government operation of the railroads, after which the RLA boards were modeled] were to settle *grievances of every kind and character growing out of disputes that arose over the interpretation of existing agreements as to scales of wages and conditions of service.* [*Leg. Hist.* at 192 (remarks of Rep. Barkley, 69th Cong., 1st Sess., Feb. 24, 1926) (emphasis supplied).]

As Rep. Barkley later added:

> You see, there are two types of disputes recognized on railroads. One is the interpretation of agreements already in existence, applying to discipline and small grievances that may not only come up with reference to groups of men but may arise with reference to a single man. These are all technical. They have nothing to do with wages received, but the have to do with the technical interpretation of agreements that exist and the exercise of discipline between the management and employees. [*Id.*, at 205.]

The explanation offered on the Senate side by Senator Watson, the Chairman of the reporting committee, was similar. Beginning, as had Representative Barkley, with an historical survey covering the period of governmental operation of the railroads, Senator Watson stated:

> During that period many cases were referred to these boards of adjustment; but the boards of adjustment in that case, as in this bill provided, had to do only with *grievances—that is to say, with the interpretation and the application of existing agreements as to wages, hours of labor, and conditions of service* . . . The problems are all of a technical nature and therefore railroad men are required to decide them. So that . . . in the measure before us, we provide for boards of adjustment to settle those technical questions that arise growing out of the interpretation and the application of existing agreements as to wages, hours of labor, and conditions of service . . . [*Leg. Hist.* at 480 (Remarks of Sen. Watson, 69th Cong., 1st Sess., May 6, 1926) (emphasis supplied).][8]

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[8] *Amicus Curiae* National Railway Labor Conference, without quoting the quite explicit statements we have reproduced in the text, relies primarily upon two other statements, also by Rep. Barkley and Senator Watson, as demonstrating an intent to provide for mandatory arbitration of disputes distinct from contractual ones. *See* Labor Conf. Br. at 9. Particularly when read in conjunction with the other, unambiguous remarks by the same individuals we have quoted, the ambiguous statements quoted in the Labor Conference brief do not support the Labor Conferences' Contention.

The *whole* of the paragraph by Senator Watson relied upon by the Labor Conference reads:

> Let me say, Senators—and this is essential in the consideration of the question—that there are two classes of disputes that arise in connection with the operation of railroads. One class is what are ordinarily called grievances. They may be of a personal nature; they may involve a great many employees; they may involve a few employees; they may involve but one employee. Of this class, also, are disputes arising out of the interpretation and application of existing agreements as to wages, hours of labor, or working conditions. [Leg. Hist. at 477 (remarks of Sen. Watson, 69th Cong. 1st Sess., May 6, 1926.]

The foregoing surely does *not* state that a grievance is *not* a contract-related dispute; indeed, the second sentence says that the "class" of grievances covers contract disputes.

Rep. Barkley's statement that Adjustment Boards will discuss "disagreements over grievances, interpretations, discipline, and other technicalities that arise from time to time in the workshop and out on the tracks" (Leg. Hist. at 210 (remarks of Rep. Barkley, 69th Cong., 1st Sess., Feb. 24, 1926) appears to be simply a summary of the same Representative's more precise remarks quoted in text.

Of the two other remarks the Labor Conference presents in support of its position (Labor Conf. Br. at 9 n.8) the one by Rep. Mapes simply parrots the statute, while Rep. Cooper's description of Adjustment Boards as having jurisdiction over "grievances or disputes growing out of a misunderstanding of the interpretation or application of agreements" is most fairly read as one in which the dependent phrase "growing out of" modifies *both* "grievances" and "disputes", and not simply the latter.



From these explanations, it appears that the language of the minor disputes provisions of the RLA was chosen to make absolutely clear that all varieties of contractual disputes—those arising from the complaints of individuals or groups of individuals, as well as those precipitated by union-management discussions or disputes, or that concern future application of existing contracts—were to be covered. None of the speakers manifested any intent to reach beyond contract-related matters.

This conclusion is decisively confirmed by the legislative history of the 1934 amendments to the RLA. Those amendments entirely revised the minor disputes provisions of the Act, establishing a mandatory rather than a voluntary Adjustment Board. 48 Stat. 1185, Pub. L. 73-442 (1934); *see Leg. Hist.* at 820 (S. Rep. No. 1065, 73rd Cong., 2d Sess. (1934); *id.*, at 918 (H.R. Rep. No. 1944, 73rd Cong., 2d Sess. (1934)). The jurisdiction of the new Adjustment Board was described with the same language used previously—"disputes . . . growing out of grievances or out of the interpretation and application of agreements". RLA § 3, First, (i), 45 U.S.C. § 153 First, (i). This time the House Committee Report made it clear that the term "grievances" was not used to designate a group of disputes distinct from contractual ones; rather, the new National Adjustment Board was described as having authority over

> minor disputes known as "grievances," which develop from the interpretation and/or application of the contracts between the labor unions and the carriers. [*Leg. Hist.* at 919-920, H. Rep. 1044, 73rd Cong., 2d Sess. (1934).]

Finally, the Congresses that amended the Act in other ways in later years have manifested the understanding that the realm of Adjustment Board activity is limited to contractual disputes, and acted upon that understanding. For example, when, in 1936, the Act was amended to cover the newly-developing airlines, the decision was made to delay establishing an Airline Adjustment Board. The explanation offered for the delay was that:

> The [National Air Transport Adjustment Board] will be created and will function in the same manner as the railway board, excepting that it need not be established immediately . . . The reason for this permissive delay in its formation is that *there is nothing for such a board to do until employment contracts have been completed*, and there are no such contracts in operation now. [*Leg. Hist.* at 1050



> (H.R. Rep. No. 2243, 74th Cong. 2d Sess. (1936) (emphasis supplied).]

And in the 1966 Congress, which once again revised the minor dispute provisions (*see Andrews v. Louisville & Nashville RR Co., supra*), the understanding expressed repeatedly was that those provisions applied to matters of contract interpretation of one kind or another. *See Leg. Hist.* at 1309 (H. Rep. No. 1114, 89th Cong., 1st Sess. (1965)) (the minor disputes mechanisms apply to "grievances arising under collective bargaining agreements"); *Leg. Hist.* at 1352 (remarks of Rep. Staggers, 89th Cong., 2d Sess., Feb. 9, 1966); *id.* at 1363 (remarks of Rep. Thompson, Feb. 9, 1966); *id.* at 3717 (remarks of Rep. Horton, Feb. 9, 1966).

In short, Congress did not direct to the RLA arbitral forum workplace disputes generally, or personal injury suits, whether under the FELA or otherwise, particularly. Rather, the RLA's history indicates a clear intention to confine the scope of compulsory arbitration of minor disputes to disagreements related to a collective bargaining agreement.[9] If there is any basis for preclud-

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[9] Moreover, even if the RLA history were not totally inconsistent with the "omitted case" *dictum* in *Burley, supra*, there would be no basis for holding the RLA-mandated dispute resolution mechanism *exclusive* outside the realm of contract-related disputes. As we have shown (pp. 9-15, *supra*), the reasoning of this Court's cases, culminating in *Andrews, supra*, that hold that the RLA arbitration scheme is exclusive is in terms confined to contract-related disputes. Further, those cases stress as the policies requiring exclusivity the need for uniformity and for expertise in the interpretation of collective agreements. *See Order of Railroad Conductors v. Pitney, supra*; *Slocum v. Delaware, L. & W.R. Co., supra*; *Machinists v. Central Airlines*, 372 U.S. 682, 691-92 (1963). *Compare Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Neither of these policies has the same compelling force outside the area of contract-related disputes.

While "[t]he possibility of conflicting substantive interpretations [of a collective agreement] under competing legal systems would tend to stimulate and prolong disputes as to its interpretation" (*Lucas Flour, supra*, 369 U.S. at 103), there is nothing similarly

ing this particular action under the FELA, therefore, that basis must involve either the purported contract-related nature of this lawsuit (*see* Pet. Br. at 18-19), or some limitation arising from the FELA considered independently. We discuss these two possibilities in turn below. Parts II and III, *infra*.

**II. As a Federal Statute Providing Specific Minimum Protection to Each Individual Employee, the FELA Confers Rights Enforceable in Court Regardless of Whether an Affected Employee Also has a Remedy Available Under the RLA Grievance-Arbitration System.**

Petitioner suggests that even if, as we maintain, the RLA dispute resolution system culminating in the Railroad Adjustment Board has jurisdiction only over contract-related disputes, that requirement is satisfied here, so that an FELA suit based in any way upon Buell's

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untoward about the possibility that public law that applies to a transaction also covered by a contract creates additional rights in one of the contracting parties. And, like arbitrators under NLRA contracts,

> The arbitrators under [the RLA] are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; *he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.* [*United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960) (emphasis supplied).]

Further, the adjudication of common law and statutory actions not rooted in collective bargaining agreements is traditionally a judicial function, and one as to which arbitrators have little expertise.

Thus, even if the kind of disputes referred to in *Burley* as "omitted cases" *could* be processed through the RLA-mandated dispute resolution mechanism, there is no basis with respect to such disputes for making the RLA processes exclusive rather than (as *Burley* itself plainly contemplated) optional.



claim concerning his supervisor is impermissible. Pet. Br. at 18. We pass over the question whether there is in fact sufficient connection between the terms of the collective bargaining agreement and the dispute respondent seeks to adjudicate to allow meaningful pursuit of that dispute under the RLA procedures, and assume that there is. For, under long established and oft-repeated principles, such agreements, and their enforcement procedures, do not displace, substantively or procedurally, any "right arising out of a statute designed to provide minimum substantive guarantees to individual workers" Congress may choose to establish. *Barrentine v. Arkansas Best Freight System*, 450 U.S. 728, 737 (1981). Consequently, there is neither any basis for perceiving a "conflict" between the RLA and the FELA simply because each may provide a remedy—albeit a different one—in a given factual situation ((A), *infra*) nor any ground for precluding an employee from maintaining an FELA action because a grievance should have been first filed or in a particular situation (as here) actually was filed ((B), *infra*).

A. Petitioner's primary suggestion is that as long as there is any "overlap" in coverage between the RLA minor disputes provisions and the FELA, there is a "conflict" which this Court must resolve by "decid[ing] which of the two statutes prevails [if] . . . a workplace disagreement . . . arguably subject to the collective bargaining agreement also sounds in tort." Pet. Br. at 20. Petitioner "submit[s] that in such cases of conflict, the more specific provisions of the later-enacted RLA must prevail." *Id.*[10] In other words, petitioner maintains that

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[10] We note that FELA was amended twice after the Railway Labor Act minor disputes provisions were first enacted. Law of August 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; Law of June 25, 1948, c. 646, Sec. 18, 62 Stat. 989. *See Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943), discussing the important 1939 amendment.

in 1926, Congress repealed the 1906 FELA in whole or in large part.[11]

The short answer to this remarkable contention is that "Repeals by implication are not favored . . . and least of all where inveterate usage forbids the implication." *General Motors Acceptance Corp. v. United States*, 286 U.S. 49, 56 (1932). *See also Watt v. Alaska*, 451 U.S. 259, 267 (1981) and cases cited therein; *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 416-17 n.20 (1968). In particular,

> When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal "must be clear and manifest." . . . It is not sufficient . . . "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be . . . cumulative or auxiliary." [*United States v. Borden*, 308 U.S. 188, 198 (1939).]

This is the rule this Court has applied to contractual and statutory claims growing out of a single transaction in the employment context; the Court has recognized "[t]he distinctly separate nature of these contractual and statutory rights," and has concluded that "certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 50 (1974). *See also McKinney v. Missouri-Kansas-Texas Ry. Co.*, *supra*; *Barrentine*, *supra*; *McDonald v. City of West Branch*, —— U.S. ——, 104 S. Ct. 1799 (1984); *cf. Metropolitan Life Ins. Co. v. Massachusetts*, —— U.S. ——, 105 S. Ct. 2380, 2396-99 (1985). For, as this Court has noted, Congress has both "give[n] specific

[11] As we noted at the outset (pp. 1-5, *supra*), there is no principled distinction between this case (assuming FELA coverage of respondent's claim) and any other FELA case. Standard FELA personal physical injury cases involve workplace disputes, and will often involve alleged contractual violations of safety provisions. Petitioner's "conflict" contention is therefore inevitably a wide-sweeping one.



minimum protections to *individual* workers" (*Barrentine*, *supra*, 450 U.S. at 739),[12] and at the same time conferred on the employees collectively the ability to bargain for protections that go beyond that minimum. Both those individual rights and those collective rights are part of our national labor policy, and there is no reason one must be sacrificed to the other.

Nor is there any basis whatever for departing from these well-established principles in this instance. To the contrary, while we have searched the legislative history of the 1926 RLA for so much as one indication of an intent to work a change as monumental as vitiating the FELA, not surprisingly, we have found none. In fact, neither at the RLA hearings nor in the debates was the FELA mentioned, as far as we could ascertain. The notion that a statute as important to the railroad industry as the FELA was repealed or critically amended so quietly that the fact has escaped notice for sixty years is simply not credible.

(B) There is perhaps implicit in petitioner's more ambitious argument the less startling suggestion that at least some accommodation between the two statutes—such as an exhaustion or election of remedies requirement—is merited. But once again, this Court has rejected all such attempts to force an artificial interrelationship between federal statutes conferring individual employee rights and federal collective bargaining schemes. Where "Congress [has] granted individual employees a nonwaivable, public law right . . . that [is]

[12] These minimum standards have been expanding in recent years, and now include, *inter alia*, Title VII of the Civil Rights Act, the Equal Pay Act, the Occupational Health & Safety Act, the Employment Retirement Security Act, Title III of the Consumer Credit Protection Act, the Age Discrimination Act of 1967, Title IX of the Education Amendments of 1972, and the various mine safety and health protection acts, as well as the older FELA, federal workers' compensation acts, Jones Act, veterans' acts, and Fair Labor Standards Act. *See generally* Feller, *Arbitration: The Days of Its Glory Are Numbered*, 2 Ind. Rel. L. J. 97, 105 (1977).

separate from the rights created through the 'majoritarian process' of collective bargaining," the Court has insisted that the availability of arbitration cannot compromise unfettered access to the judiciary for enforcement of the individual rights. *Barrentine, supra,* 450 U.S. at 738; *McDonald, supra,* 104 S. Ct. at 1803-04; *Alexander v. Gardner-Denver, supra.*

Nor is the problem a new one in the RLA context. In *McKinney v. Missouri-Kansas-Texas RR Co., supra,* the Court held the "petitioner was not obliged, before bringing suit in the District Court under [Sec. 9(d) of the Universal Military Training and Service Act] . . . to pursue remedies possibly available under the grievance procedure set forth in the collective bargaining agreement or before the National Railroad Adjustment Board." 357 U.S. at 268. The reasoning of *McKinney* is basically the same as that in the later NLRA and public employee cases cited above:

> The rights petitioner asserts are rights created by federal statute even though their determination may necessarily involve interpretation of a collective bargaining agreement. . . . Petitioner sues not simply as an employee under a collective bargaining agreement, but as a veteran asserting special rights bestowed upon him in furtherance of a federal policy . . . . For the effective protection of these distinctively federal rights, Congress provided in . . . the Act that if any employer fails to comply with the provisions of the statute, the District Court . . . has jurisdiction to compel compliance and to compensate for loss of wages. The court is enjoined to order speedy hearing in any such case . . . and the United States Attorney must appear and act for the veteran in the prosecution of his claim. . . . Nowhere is it suggested that before a veteran can obtain the benefit of this expeditious procedure . . . he must exhaust other avenues of relief possibly open under a collective bargaining agreement or before a tribunal such as the National Railway Adjustment Board. . . . To insist that the veteran first exhaust other possibly lengthy and doubtful procedures on the ground that his claim is not different from any other employee grievance or claim under a collective bargaining agreement would ignore the actual character of the rights asserted and defeat the liberal procedural policy clearly manifested in the statute for the vindication of those rights. [357 U.S. at 268-70.]



*McKinney* makes it plain that there is nothing about the arbitration procedures of the RLA that makes the principle most recently enunciated in *McDonald, supra,* in any way inapplicable.

Nor is the FELA any more waivable through collective action, or any less dependent upon judicial enforcement, than the individual rights statute involved in *McKinney,* or those in the more recent cases. To the contrary, one of the principle purposes of the FELA is to prevent the waiver, through collective action or otherwise, of the right to sue one's employer in court for on-the-job injuries. FELA § 5, 45 U.S.C. § 55; *see Philadelphia, Baltimore & W. RR Co. v. Schubert,* 224 U.S. 603 (1912); *Duncan v. Thompson,* 315 U.S. 1 (1942); *Boyd v. Grand Trunk Western R. Co.,* 338 U.S. 263 (1949). And, under the FELA, "[t]he right to trial by jury," unavailable, of course, except in state or federal court

> . . . is part and parcel of the remedy afforded railroad workers under the . . . Act. . . . [T]he jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. . . . To deprive these workers of the benefit of a jury trial . . . is to take away a goodly portion of the relief which Congress has afforded them. [*Bailey v. Central Vermont Ry.,* 319 U.S. 350, 354 (1943).]

*See also, Dice v. Akron, Canton & Youngstown R. Co., supra,* 342 U.S. at 361.

The upshot of the foregoing is, to paraphrase this Court's conclusion in *Barrentine, supra*:

> [T]he [FELA] rights [respondent[ seek[s] to assert in this action are independent of the collective bargaining process. They devolve on petitioners as in-

dividual workers, not as members of a collective organization. They are not waivable. Because Congress intended to give individual employees the right to bring their . . . claims under the [FELA] in court, and because these congressionally granted [FELA] rights are best protected in a judicial rather than in an arbitral forum, . . . [respondent did not have to exhaust the RLA grievance-arbitration system, and is not precluded from proceeding in court because he did.] [450 U.S. at 745.]

**III. Injuries to an Employee's Emotional Health Attributable to an Employer's Negligence or to a Statutory Violation are Compensable Under the FELA.**

Petitioner's arguments concerning the FELA coverage for emotional injuries flow almost exclusively from the same erroneous contention regarding "tension" or "conflict" between the RLA and the FELA already discussed. Pet. Br. at 26, 29-30. Considered without regard to the RLA, the principles this Court has established in the past to govern construction of the FELA compel the conclusion that there is no basis for a judicial exclusion of emotional injuries from the FELA's broad coverage.

First, this Court has already held that in construing the FELA, it is of no moment that "when the statute was enacted, Congress' attention was focused primarily upon [physical] injuries and death resulting from accidents on interstate railroads." *Urie v. Thompson*, 337 U.S. 163, 181 (1949). Rather, given the broad statutory language,[13] the appropriate inquiry is whether "[anything] in either the language or the legislative history discloses any intent to *exclude* from the Act's coverage any injury

[13] As the *Urie* Court noted:

> The language [of the FELA] is as broad as could be framed: "any person suffering injury while he is employed"; "such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; . . . ." The wording was not restrictive as to the employees covered; the cause of injury [,] . . . *or the particular kind of injury resulting.* [337 U.S. at 181 (emphasis added).]



resulting 'in whole or in part from the negligence' of the carrier." *Id.* at 181. For,

> On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable.
>
> * * *
>
> To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of the negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court. [*Id.* at 181-82.]

Second, the common law meaning of the term "injury" as of 1906 cannot be read into the Act as a limitation upon its broad language. The *Urie* Court did suggest that common law concepts as of 1906, while not conclusive, might have some relevance in interpreting the FELA. *Id.* at 182. In later cases, however, this Court made clear that the state of the common law at the time of the enactment of the FELA is not an accurate guide to that statute's interpretation. As the Court noted, the FELA is "an avowed departure from the rules of the common law . . . ., a response to the special needs of the railroad workers . . . [that] seeks to adjust [the cost of human injury] equitably between the worker and the carrier." *Sinkler v. Missouri Pacific RR Co., supra*, 356 U.S., at 329. For this reason, in interpreting the FELA, this Court has placed upon the courts the responsibility "to evolve, much in the manner of the common law, a system of principles for providing compensation for injuries to employees consistent with the changing relatives of employment in the railroad industry." *Kernan v. American Dredging Co., supra*, 355 U.S. at 437.

The relevant inquiry, therefore, is not what the common law was in 1906, but what *contemporary* common law principles, applied in light of the FELA's broad language and equitable purposes, provide. And, contem-

porary jurisprudence recognizes that purely emotional harm can be an "injury" for tort purposes in at least some instances. *See* Prosser & Keeton on Torts §§ 12, 54 (5th Edition 1984). Moreover, in the FELA context, there is no basis for the implication that Congress intended to shift to employees the cost of emotional injuries—but not physical injuries—inflicted through employer wrongs. Compensation for emotional injuries, in other words, comports with both the language and the purposes of the FELA and is therefore entirely proper.

## CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

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# AMICUS CURIAE

# BRIEF

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IN THE

# Supreme Court of the United States

October Term, 1985

ATCHISON, TOPEKA & SANTE FE RAILWAY CO.,

*Petitioner,*

v.

JIM BUELL,

*Respondent.*

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

## BRIEF FOR TEAMSTERS FOR A DEMOCRATIC UNION AND PUBLIC CITIZEN AS *AMICI CURIAE*

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## BRIEF FOR TEAMSTERS FOR A DEMOCRATIC UNION AND PUBLIC CITIZEN AS *AMICI CURIAE*

The Court is presented with two questions in this case. On the question whether the Federal Employers Liability Act ("FELA") covers tort claims for emotional injuries, *amici* express no views. *Amici* are concerned only with the question whether, if the FELA does extend to such tort claims, they are nevertheless precluded by the exclusive procedures for resolving minor disputes under the Railway Labor Act ("RLA"). Petitioner's theory, particularly as expounded by the associations of employers appearing here as its *amici*, is that any dispute which arises out of the employment relationship is a minor dispute which must be resolved by the arbitration procedures before the National Railroad Adjustment Board ("NRAB").

At first glance, this question is to be resolved simply by construing, and perhaps reconciling, two federal statutes. But lurking just below the surface is the question of RLA preemption of state laws governing various aspects of the employment relationship. That question is implicated because,

if the term minor dispute reaches as broadly as the companies argue, then employee claims under state minimum wage, civil rights, workers compensation, retaliatory discharge, and many other laws would also be minor disputes subject to preemption by RLA procedures. *Amici* file this brief, with the written consent of the parties, in order to urge the Court not to adopt that construction of the RLA.

## INTEREST OF AMICI CURIAE

This brief is filed on behalf of two *amici curiae*, Teamsters for a Democratic Union ("TDU") and Public Citizen, whose interests differ from those of respondent. TDU's members belong to the Teamsters union. Because some of them are employed in the air transportation industry, they are subject to the RLA. If those members must rely on arbitration to vindicate their rights under state law, the result will be to diminish or even deny them the legal protections that the states have provided to other, non-RLA or non-union workers.

Public Citizen is a public interest organization founded by Ralph Nader, which often represents union members (including members of TDU) whose rights would be cut off by adoption of the preemption argument urged by petitioner in this case. Additionally, Public Citizen is concerned about the effect on the general public of preempting state laws which protect the public by preventing employees from being discharged for refusing to participate in, or for blowing the whistle on, illegal conduct in their workplaces.



## ARGUMENT

### THE RAILWAY LABOR ACT DOES NOT REQUIRE EMPLOYEES TO SUBMIT CLAIMS WHICH ARE BASED ON STATE LAW, AND WHICH ARE INDEPENDENT OF ANY COLLECTIVE BARGAINING AGREEMENT, TO ARBITRATION PROCEDURES CONTROLLED BY THEIR UNIONS.

Petitioner bases its argument that the RLA supersedes respondent's FELA claim on a number of cases in which the courts have refused to allow railroad employees to pursue wrongful discharge claims under state law. Those courts have ruled that such claims are minor disputes under the RLA, and consequently that the only forum in which the claims may be resolved is the NRAB. *E.g., Andrews v. Louisville & Nashville RR Co.*, 406 U.S. 320 (1972). The court of appeals distinguished those cases on the ground that they involved state law claims based on collective bargaining agreements, unlike this case which involves a federal law claim which is independent of any collective bargaining agreement. Pet. App. 5a-7a. Respondent's brief emphasizes only half of that distinction: he argues that the *Andrews* line of cases involved state law claims, and that here, by contrast, the question is whether a claim under a federal statute is superseded by another federal statute. Respondent further argues that where two federal statutes are involved, the Court should first attempt to harmonize them in a way that preserves as much as possible of each of them, rather than holding one inconsistent with the other.

*Amici* would be happy to see the Court rule in respondent's favor in this regard by characterizing the claim as one which arises under the FELA rather than one which arises under the RLA. We are concerned, however, about the implications of the state/federal distinction suggested by respondent as the reason not to apply the *Andrews* line of cases here. If the Court were to rule that the fact that the right here is a federal one is what makes the difference with respect to RLA preemption, the implication might be that state law claims pertaining to the

employment relationship *are* preempted, and must therefore be relegated to the NRAB for disposition.

In that event, employee claims under state civil rights laws, minimum wage laws, and similar statutes would be deemed minor disputes. So, too, would claims under the various common law theories barring retaliatory discharge which have been developed by the courts in many states to protect employees from being fired for blowing the whistle on illegal employer activity, or for asserting their rights under various worker protection laws. Thus, employees would lose the right to seek redress in state courts under state law, and the state, in turn, would be deprived of the power to provide a forum for the vindication of state law rights. And, as this Court has repeatedly observed in the context of federal law claims, the employees' public law claim would be handled by an arbitration procedure which is designed primarily for the resolution of disputes about collective bargaining agreements, not disputes about rights under public law. *E.g., Barrentine v. Arkansas-Best Freight Syst.*, 450 U.S. 728, 743 (1981); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

The better distinction between the *Andrews* line of cases and this case—and the distinction which preserves both federal and state law claims against preemption by the RLA—is not that the plaintiffs in *Andrews* and its progeny relied on state as opposed to federal law, but that the state law claims which they asserted were founded on an interpretation or application of a collective bargaining agreement. Thus, the RLA requires the submission to the NRAB only of "disputes. . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153 First (i). In *Andrews* the Court required submission of a wrongful discharge claim to the NRAB because petitioner's claim depended on an interpretation of a collective bargaining agreement. 406 U.S. at 324. The Court overruled prior cases under the RLA which allowed states to provide an alternate remedy for violation of collective bargaining agreements, relying in large part on the fact that state contract remedies had been similarly forbidden, and arbitration required, in cases under section 301 of the Labor Management Relations Act ("LMRA"). *Id.* at 323, *citing Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), and *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).



But in industries covered by the LMRA, this Court has never held that federal statutory claims are subject to compulsory binding arbitration; quite to the contrary, the Court has repeatedly ruled that employee claims under other federal statutes may be pursued in court, either without first resorting to arbitration under the collective bargaining agreement, *Electrical Workers v. Robbins & Myers*, 429 U.S. 229 (1976), or even after a parallel contractual claim has been lost in arbitration. *E.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight Syst.*, 450 U.S. 728 (1981). Similarly, the Court has held that, although state law claims which depend on a particular construction of a collective bargaining agreement are subject to mandatory exhaustion of arbitration procedures under the LMRA, the preemptive effect of section 301 does not extend to "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904, 1911-1912 (1985). *See also Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380, 2397-2398 (1985) (general federal labor laws do not preempt state minimum labor standards). Thus, the fact that a particular collective bargaining agreement may give employees rights that are parallel to those provided by state law, or the fact that a discharge would have been permitted by the agreement, except that the reason for the discharge is contrary to state law, does not deprive either the state or the employees of the right to have the state law claims resolved by the tribunals provided by the state.

We recognize the theoretical possibility that RLA preemption might be broader than LMRA preemption of state regulation of minimum labor standards, because unlike the LMRA, the RLA expressly requires arbitration of contract disputes. However, this distinction is more theoretical than real because section 203(d) of the LMRA, and this Court's decisions beginning with the

*Steelworkers Trilogy*, 363 U.S. 564, 574, 593 (1960), strongly encourage arbitration of contract disputes. Indeed, almost all collective bargaining agreements in industries covered by the LMRA provide for arbitration. Accordingly, the principles of *Barrentine, Gardner-Denver*, and similar cases have been applied to claims by railroad employees to preclude RLA preemption of other federal statutory claims. *McKinney v. Missouri-Kansas-Texas RR Co.*, 357 U.S. 265, 268-270 (1958); *see also Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975).

Nor is there any reason to give the RLA more effect than the LMRA in preempting minimum labor standards promulgated by the states, as opposed to the federal government. After all, preemption is ultimately a matter of Congressional intent, and it is unlikely that Congress would have intended to bar the states from providing protections to railroad employees. Indeed, the Court has already refused to give the RLA the effect of preempting state civil rights laws, *Colorado Anti-Discrimination Comm. v. Continental Air Lines*, 372 U.S. 714, 724 (1963), or state laws forbidding discharge for filing a workers compensation claim. *Pan American World Airways v. Puchert*, 105 S. Ct. 2693 (1985), *dismissing appeal from Puchert v. Agsalud*, 677 P.2d 449 (Hawaii 1984). In this regard, we note that the jurisdictional statement in *Puchert* was filed in May, 1984, and not dismissed until after *Allis-Chalmers v. Lueck* was decided, thereby strongly suggesting that the principles of *Allis-Chalmers* apply to the RLA as well as the LMRA.

We also recognize that some lower courts have said that the RLA preempts state wrongful discharge claims. *Koehler v. Illinois Central Gulf RR Co.*, 109 Ill.2d 473, 488 N.E.2d 542 (1985). Insofar as the authority under which the discharge is "wrongful" is the collective bargaining agreement, those decisions are correct. *E.g., Beers v. Southern Pacific Transp. Co.*, 703 F.2d 425, 428, 429 (9th Cir. 1983); *Machinists v. Northwest Airlines*, 673 F.2d 700, 709-712 (3d Cir. 1982); *Choate v. Louisville & Nashville RR Co.*, 715 F.2d 369, 371-372 (7th Cir. 1983). But insofar as the preemptive effect is extended to torts based on duties whose existence is independent of a collective bargaining agreement,



we believe that such cases are inconsistent with this Court's decisions in *Colorado Anti-Discrimination Commission*, *Lueck*, and *Puchert*. Although petitioner and its supporting *amici* repeatedly refer to labor-management relationships in the railroad industry as being unusually complex, that claim does not warrant a more expansive doctrine of preemption than under the LMRA. We have no doubt that such relationships can be complicated, or that disputes can have far-reaching economic consequences, but we rather doubt that this is any less so of multi-employer construction sites, or the steel or auto industries. Thus if, as this Court has held, Congress did not intend the LMRA to preempt state law employment claims which are independent of rights under a collective bargaining agreement, the nature of the railroad industry provides no basis for believing that Congress intended the RLA to preempt such claims either.

If, on the other hand, the Court concludes that the question of RLA preemption of such claims remains open, it should not take this case as the occasion for resolving what Judge Posner has rightly described as the "disarray [in] the case law on the displacement of [state] tort law by the Railway Labor Act." *Jackson v. Conrail*, 717 F.2d 1045, 1061 (7th Cir. 1983) (dissenting). Nor should the Court implicitly resolve that question in favor of preemption, in the course of considering the parties' arguments about the effect of the RLA on another federal statute, the FELA. Rather, it should wait to address that question until it has been fully briefed and addressed by the parties in a case squarely presenting the issue. In that event, the Court should, in the course of deciding whether plaintiff may pursue his FELA claim, indicate that the question of preemption of independent state law claims is left for another day.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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